CLERK'S COPY.

# TRANSCRIPT OF RECORD.

[redacted] COURT OF THE UNITED STATES.

[redacted] TERM, [redacted]

No. [redacted] 173

[redacted] PERCH, MOSES CLAY PERCH, AND [redacted] INVESTMENT COMPANY, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA.

[redacted]

[redacted]

# (27,293)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1919.**

# No. 538.

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CLAY ARTHUR PIERCE, HENRY CLAY PIERCE, AND PIERCE INVESTMENT COMPANY, APPELLANTS,

*vs.*

THE UNITED STATES OF AMERICA.

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**APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.**

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INDEX.


| | Original. | Print. |
|---|---|---|
| Caption to transcript from United States circuit court of appeals | *a* | 1 |
| Waiver of citation | 1 | 1 |
| Transcript from United States district court for the eastern district of Missouri | 1 | 1 |
| Bill of complaint | 2 | 2 |
| Exhibit A—Minutes of the meeting of the board of directors of the Waters Pierce Oil Company, July 9, 1913 | 6 | 5 |
| Separate motion to dismiss of Henry S. Priest and Clay A. Pierce, trustees | 9 | 9 |
| Separate motion to dismiss of Henry C. Pierce and Pierce Investment Trust Co | 10 | 9 |
| Amended motion to dismiss of Henry C. Pierce and Pierce Investment Trust Co | 11 | 10 |
| Amended motion to dismiss of H. S. Priest and C. A. Pierce | 13 | 12 |
| Third amended motion to dismiss of H. C. Pierce and Pierce Investment Co | 15 | 14 |
| Order of submission of motions to dismiss, March 1, 1917 | 17 | 15 |
| Order of submission of motions to dismiss vacated, etc | 17 | 16 |
| Amended bill of complaint | 18 | 16 |


JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 8, 1919.

| | Original. | Print. |
|---|---|---|
| Order allowing amended bill of complaint to be filed, etc.. | 24 | 21 |
| Separate motion to dismiss of H. C. Pierce and Pierce Investment Trust Co | 24 | 21 |
| Separate motion to dismiss of Henry S. Priest and Clay A. Pierce | 26 | 23 |
| Order of submission of motions to dismiss, October 17, 1917. | 28 | 25 |
| Order overruling motions to dismiss | 28 | 25 |
| Separate answer of H. C. Pierce and Pierce Investment Trust Co | 28 | 25 |
| Order of submission of cause on stipulation and agreed statement of facts | 33 | 30 |
| Stipulation and agreed statement of facts | 33 | 30 |
| Exhibit A—Minutes of the meeting of the board of directors of the Waters Pierce Oil Company, July 9, 1913 | 39 | 35 |
| Certified copy of bill of complaint, filed February 4, 1916, in the U. S. district court, northern district of Louisiana, in the case of United States of America *vs.* Pierce Oil Corporation | 42 | 37 |
| Certified copy of answer, filed March 6, 1916, in the U. S. district court, northern district of Louisiana, in the case of United States of America *vs.* Pierce Oil Corporation | 53 | 46 |
| Affidavit of Clay A. Pierce as to shares of stock, etc., of Pierce Oil Corporation | 57 | 49 |
| Decree, March 11, 1918 | 58 | 50 |
| Petition for and order allowing appeal | 60 | 52 |
| Record entry of the filing of assignment of errors, petition for appeal, etc | 60 | 52 |
| Assignment of errors | 61 | 52 |
| Order approving appeal bond | 64 | 56 |
| Appeal bond | 64 | 56 |
| Praecipe for and election as to transcript | 66 | 57 |
| Clerk's certificate | 66 | 58 |
| Appearance of Mr. Robert A. Hunter as counsel for appellee.. | 68 | 58 |
| Appearance of Mr. G. T. Priest as counsel for appellants | 68 | 59 |
| Appearance of Mr. W. H. Woodward as counsel for appellee.... | 69 | 59 |
| Appearance of Messrs. Fordyce, Holliday & White and Mr. Truman Post Young as counsel for appellants | 69 | 59 |
| Appearance of Mr. Albert D. Nortoni as counsel for appellants.. | 69 | 59 |
| Order of submission | 70 | 59 |
| Opinion on merits, Hook, J | 71 | 60 |
| Decree | 78 | 65 |
| Petition for rehearing | 79 | 65 |
| Opinion on rehearing, *per curiam* | 91 | 72 |
| Order denying petition for rehearing | 92 | 72 |
| Petition for appeal and allowance | 92 | 72 |
| Assignment of errors on appeal | 93 | 73 |
| Stipulation as to supersedeas bond on appeal | 96 | 76 |
| Bond on appeal | 97 | 76 |
| Praecipe for transcript on appeal | 98 | 77 |
| Citation on appeal and marshal's return of service | 100 | 78 |
| Clerk's certificate | 101 | 79 |

a Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1918, of said Court, before the Honorable William C. Hook and the Honorable Kimbrough Stone, Circuit Judges, and the Honorable Martin J. Wade, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
*Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.*

Be it remembered that heretofore, to-wit: on the first day of April, A. D. 1918, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Eastern District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein Clay Arthur Pierce, et al., were Appellants, and the United States of America was Appellee, which said transcript as prepared and printed, under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 (*Waiver of Citation.*)

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

No. 4538. In Equity.

UNITED STATES OF AMERICA, Plaintiff,

vs.

WATERS PIERCE OIL COMPANY, HENRY S. PRIEST, CLAY ARTHUR PIERCE, HENRY CLAY PIERCE INVESTMENT TRUST COMPANY, Defendants.

Plaintiff in the above entitled cause hereby waives the issuance of citation upon the appeal of the defendants to the United States Circuit Court of Appeals for the Eighth Circuit, from the judgment entered in the district court of the United States for the Eastern Division of the Eastern District of Missouri, on the 11th day of March 1918, and agrees to enter its appearance in said Circuit Court of Appeals for the Eighth Circuit to the May term thereof.

UNITED STATES OF AMERICA,
By W. H. WOODWARD,
*Its Attorney.*

Endorsed: Filed in the District Court on March 22, 1918.

UNITED STATES OF AMERICA,
*Eastern Division of the Eastern*
*Judicial District of Missouri, ss:*

In the District Court of the United States Within and for the Eastern Division of the Eastern Judicial District of Missouri.

Be It Remembered, that heretofore, to-wit on the 18th day of February, in the year of our Lord one thousand nine hundred and sixteen, there was filed in the office of the Clerk of the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri, a certain bill of complaint wherein United States of America, is Plaintiff, and Waters Pierce Oil Company, Henry S. Priest, Clay Arthur Pierce, Henry Clay Pierce, and Pierce Investment Trust Company, are defend-
2 ants, which said bill of complaint was duly numbered 4538, and is in words and figures as follows, to wit:

(*Bill of Complaint.*)

To the Honorable the Judges of the District Court of United States for the Eastern District of Missouri, Sitting in Equity:

Your petitioner, the United States of America, by Arthur L. Oliver, its attorney for the Eastern District of Missouri, brings this proceeding in equity against the Waters Pierce Oil Company, Henry S. Priest, Clay Arthur Pierce, Henry Clay Pierce, and Pierce Investment Trust Company, for the purpose of collecting a judgment obtained by the United States in the District Court for the Western District of Louisiana, which said judgment bears date of March 20, 1914, and is for the sum of Fourteen Thousand Dollars, interest and costs, and upon information and belief your petitioner alleges and shows—

I.

That the Waters Pierce Oil Company, is, and at all times herein mentioned was, a corporation duly organized, existing and doing business under and by virtue of the laws of Missouri, with its principal place of business at the City of Saint Louis, Missouri; that Pierce Investment Trust Company is, and at all times herein mentioned was, a corporation organized, existing and doing business under and by virtue of the laws of Missouri, with its principal place of business at the City of Saint Louis, Missouri; and that Henry S. Priest, Clay Arthur Pierce, and Henry Clay Pierce, are all citizens of the State of Missouri and reside within the Eastern District of Missouri and within the jurisdiction of this Court.

II.

Your petitioner alleges that on January 29, 1907, at the January Term of the District Court for the Western District of Louisiana, held in the City of Alexandria, in said State, an indictment was returned and filed against the Waters Pierce Oil Company, which said indictment was assigned number 1626 on the docket of said Court and charged the said defendant, Waters Pierce Oil Company, with receiving certain rebates and concessions in violation of the Elkins Act of February 19, 1903, (32 Stat. 847); that thereafter the said case, proceeding to trial on March 20, 1914, the jury returned a verdict of guilty upon which the Court entered a judgment in favor of the plaintiff for the sum of Fourteen Thousand Dollars
3 and costs; that said costs amount to Fourteen Hundred and Seventy-four dollars and Forty-four Cents; that thereafter, to-wit, on April 21, 1914, the said Waters Pierce Oil Company was allowed a writ of error to the United States Court of Appeals for the Fifth Circuit, and upon hearing duly had the said Court of Appeals affirmed the judgment of the District Court and the mandate of said Court of Appeals affirming said judgment was filed in the District Court aforesaid on June 23, 1915; that thereafter an execution upon said judgment was issued out of said District Court, upon which said execution the United States Marshal for the Western District of Louisiana, on August 2, 1915, made a nulla bona return. Your petitioner avers that said defendant, or anyone for it, has failed and does fail and refuse to pay said judgment or any part thereof.

III.

Your petitioner further alleges that — an adjourned regular meeting of the Board of Directors of the Waters Pierce Oil Company held on the 9th day of July, 1913, at No. 420 Olive Street, in the City of Saint Louis, the said Board of Directors, pursuant to a request of holders of more than four-fifths of the capital stock of said corporation, did authorize the sale of all of the property of said corporation to the Pierce Oil Corporation organized under the laws of the State of Virginia, for and in consideration of Ten Million Five Hundred Thousand Dollars, of the common capital stock of said Pierce Oil Corporation, and Five Million Dollars in cash of the lawful money of the United States; that Clay Arthur Pierce and Henry S. Priest were, by the said Board of Directors, appointed agents and trustees of the Waters Pierce Oil Company to receive from the Pierce Oil Corporation the consideration aforesaid. A copy of the minutes of the said meeting of the Board of Directors of the Waters Pierce Oil Company is hereunto annexed and marked Exhibit A.

IV.

Your petitioner further avers that pursuant to the authority granted them by the Board of Directors, as alleged in paragraph

numbered III, Clay Arthur Pierce and T. F. Lydon, President and Secretary respectively of the Waters Pierce Oil Company, and acting for said company, did, by an indenture dated July 7, 1913, and by other indentures, deeds and assignments the date and character of which are to your petitioner unknown, convey to Pierce Oil Corporation all of its property and assets.

4

V.

Your petitioner further avers that, pursuant to the authority granted them by the Board of Directors of the Waters Pierce Oil Company, as alleged in paragraph III, Henry S. Priest and Clay Arthur Pierce, as trustee and agents for said Waters Pierce Oil Company, did receive from the Pierce Oil Corporation Ten Million Five Hundred Thousand Dollars par value of the common stock of said Pierce Oil Corporation, and Five Million Dollars in cash, which said stock and money represented and was received by them in return for the total assets of the Waters Pierce Oil Company.

VI.

Your petitioner further avers that said Henry S. Priest and Clay Arthur Pierce now hold, as trustees for Waters Pierce Oil Company, certain moneys and certain stock of the Pierce Oil Corporation, the exact amount of either being to your petitioner unknown.

VII.

Your petitioner further avers that at the time of the transfer of its assets by the Waters Pierce Oil Company to the Pierce Oil Corporation, Henry Clay Pierce was the owner of two thousand, seven hundred and twenty-seven shares of the common stock of the Waters Pierce Oil Company; and that the Pierce Investment Trust Company was the owner of one thousand shares of the common stock of the Waters Pierce Oil Company; and that Clay Arthur Pierce was the owner of one share of the common stock of the Waters Pierce Oil Company; and that they, and each of them, have received from Clay Arthur Pierce and Henry S. Priest certain proportions of the money and stock held by the said Henry S. Priest and Clay Arthur Pierce as trustees for the Waters Pierce Oil Company, as alleged in paragraph V; petitioner states that he is informed and believes that Henry Clay Pierce received the sum of Three Million, Four Hundred and Eight Thousand, Seven Hundred and Fifty Dollars; and that Pierce Investment Trust Company received the sum of One Million, Two Hundred and Fifty Thousand Dollars; and that Clay Arthur Pierce received the sum of One Thousand, Two Hundred and Fifty Dollars.

VIII.

Your petitioner further avers that the Waters Pierce Oil Company has no assets out of which a judgment could be collected, and that in equity and good conscience the money received from the sale of the assets of the Waters Pierce Company and now in the hands of its stockholders, agents and trustees, as herein alleged, ought to be subjected to the payment of the judgment of your petitioner as alleged in paragraph I.

Wherefore, your petitioner prays:

1. That writs of subpœna issue directed to defendants Waters Pierce Oil Company, Henry S. Priest, Clay Arthur Pierce, Henry Clay Pierce, and Pierce Investment Trust Company, commanding each of them to appear herein and answer the allegations contained in the foregoing petition, and abide by and perform such orders and decree as the Court may make in the premises; 2. That the Court adjudge and decree that the Waters Pierce Oil Company has no property or assets subject to execution out of which your petitioner's judgment may be collected; 3. That the Court adjudge and decree that the money and property received from the Pierce Oil Corporation and in the hands of Clay Arthur Pierce and Henry S. Priest is held in trust by them for the benefit of the Waters Pierce Oil Company and should be subjected to the payment of the debts and liabilities of the Waters Pierce Oil Company, and more particularly the judgment of your petitioner; 4. That during the pendency of this suit the defendants Henry S. Priest and Clay Arthur Pierce be restrained from conveying or assigning any money or property held by them as trustees or agents of the Waters Pierce Oil Company; 5. That the Court adjudge and decree that Henry Clay Pierce, Pierce Investment Trust Company, and Clay Arthur Pierce received moneys derived from the sale of the assets of the Waters Pierce Oil Company, and that the same be subjected to the payment of the debts and liabilities of the Waters Pierce Oil Company, and more particularly the judgment of your petitioner; 6. That your petitioner have judgment against said defendants for the sum of Fifteen Thousand, Four Hundred and Seventy-four Dollars and Forty-four Cents; 7. For such other orders and decrees as, the premises considered, may be in equity meet and proper.

(Signed) ARTHUR L. OLIVER,
*United States Attorney.*

(Signed) W. H. WOODWARD,
*Assistant United States Attorney.*

UNITED STATES OF AMERICA,
*Eastern District of Missouri, ss:*

On this 18 day of February, 1916, before me personally appeared Arthur L. Oliver, who, being by me duly affirmed, deposes and says that he is the United States Attorney for the Eastern Dis-

trict of Missouri, and that he brings this action for and in behalf of the United States of America, and that he has read the foregoing bill of complaint and knows the contents thereof and that the same is true, of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

(Signed) ARTHUR L. OLIVER.

Affirmed and subscribed to before me this 18 day of February, 1916.

(Signed) IRVING MITCHELL,

[SEAL] *United States Commissioner at St. Louis, Missouri.*

EXHIBIT "A."

(*Minutes of Meeting of Board of Directors of the Waters Pierce Oil Company, July 9, 1913.*)

Office of Waters Pierce Oil Company.

ST. LOUIS, MO., July 9, 1913.

The adjourned regular monthly meeting of the Board of Directors of the Waters Pierce Oil Company was held at the Company's Office, # 420 Olive Street, in the City of St. Louis, at eleven o'clock A. M., this, the 9th day of July, 1913, as per adjournment on the 7th inst.

There were present and participated in the meeting the following Directors,—Andrew M. Finlay, Thomas F. Lydon and J. A.
7 Steward.

The Chairman of the Board and President being absent, Mr. Andrew M. Finlay, Vice-President, presided and Thomas L. Lydon, Secretary, acted in that capacity.

Minutes of the meeting held on the 7th instant were read and approved.

Vice President Finlay stated to the Board that the Pierce Oil Corporation had been formed under the laws of the State of Virginia, and was prepared to take over all of the property and assets of this corporation, giving to this corporation $10,500,000, in par value of the capital stock oof said Pierce Oil Corporation, $5,000,000, in cash, in lawful money of the United States, and assuming all of the debts, liabilities and obligations of this corporation. Vice President Finlay stated further that the holders of more than four-fifths of the stock of this corporation had, in writing, requested the Board of Directors to make such transfer, and he duly presented such request in writing to the Board of Directors.

It was, on motion duly seconded, ordered that such request be received, and be spread on the minutes of this meeting as a part thereof, which is accordingly done as follows, viz:

ST. LOUIS, Mo., July 7, 1913.

"We, the undersigned stockholders of Waters Pierce Oil Company, a corporation organized under the laws of the State of Missouri, comprising the holders of more than four-fifths of the capital stock of said Corporation, hereby do request, authorize and direct the Board of Directors of said Corporation to transfer all of the assets of said Corporation, including all of its real, personal and mixed property, and chattels real, corporeal and incorporeal, of every name and nature, to Pierce Oil Corporation, a corporation organized and existing under the laws of the State of Virginia, in return for $10,500,000 par value of the common capital stock of said Corporation, $5,000,000 in cash in lawful money of the United States, and the assumption by said Pierce Oil Corporation of all of the debts, liabilities and obligations of the Waters Pierce Oil Company.

"This instrument may be signed in more than one original counterpart and all orginal counterparts together shall be and be deemed to be a single instrument.

8 "In Witness Whereof, the undersigned have personally or by their respective duly constituted attorneys hereto subscribed their names, and written opposite thereto the number of shares held and owned by them in the said Waters Pierce Oil Company.

"Witness:
"ALEXANDER B. SIEGEL.

H. C. PIERCE, 2727 shares
By EVEN RICHARDS, *Atty.*
"PIERCE INVESTMENT TRUST COMPANY, 1000 shares
By JOSEPH A. STEWARD, *Secretary.*
"ANDREW M. FINLAY, 1 share
"T. F. LYDON, 1 share
"J. A. STEWARD, 1 share
"CLAY ARTHUR PIERCE, 1 share."

The following preamble and resolutions were then moved, seconded and unanimously adopted:

"Whereas, Pierce Oil Corporation, a corporation organized under the laws of the State of Virginia, desires to purchase and take over all of the property and assets of this corporation, giving to this corporation $10,500,000 par value of the common capital stock of the Pierce Oil Corporation, $5,000,000 in cash in lawful money of the United States, and assuming all of the debts, liabilities and obligations of this corporation, and

"Whereas, the Board of Directors has been requested, authorized and directed in writing by stockholders of this company holding

more than four-fifths of its capital stock to make such sale and transfer upon such terms, and

"Whereas, the Board of Directors approve of such transfer upon such terms: Therefore Be It

"Resolved, that all of the real, personal, and mixed property, and chattels real, corporeal and incorporeal, of this corporation, including all of its lands, tenements, and hereditaments, of whatsoever name and nature, leases, mining claims, denouncements, prospects for oil and other mineral, easements, profits, covenants, warranties, licenses, permits, rights, and choses in action in respect of real property and chattels real, and each and every other right, title or interest which it may now have or hereafter acquire in respect of real property, corporeal or incorporeal, and all chattels real, wherever situated, together with all fixtures and articles or personal property used on or in connection with its said real property and
9 chattels real, and all of its chattels, goods, merchandise, machinery, tools, supplies, accounts, bills, notes, moneys, stocks, bonds, mortgages, credits, patents, [trade-markes] copyrights, trade names, good-will, rights and choses in action, and all and singular its other personal and mixed property, corporeal and incorporeal, of every kind, which this corporation now has or hereafter may acquire, the whole to be transferred as a going concern, in return for $10,500,000 of the common capital stock of the said Pierce Oil Corporation, $5,000,000 in cash in lawful money of the United States, and the assumption by said Pierce Oil Corporation of all of the debts, obligations and liabilities of this corporation:

"Resolved, that Clay Arthur Pierce, President; Andrew M. Finlay, Vice President; Thomas F. Lydon, Secretary, and the other officers of this corporation be and they hereby are respectively authorized and directed to do [*ann*] and all manner of things, and to make execute and deliver all and all manner of deeds, conveyances and other instruments as may be necessary, desirable or convenient to carry out the in'ent of these resolutions;

"Resolved, that Clay Arthur Pierce and Henry S. Priest be appointed agents and trustees of this corporation to receive for it the said $10,500,000 par value of the shares of the common capital stock of the Pierce Oil Corporation, the said $5,000,000 in cash, and any and all other things or instruments incident to the carrying out of the intent of these resolutions."

The meeting then adjourned until eleven o'clock A. M., Friday July 11th, 1913.

____ ____,
*Vice-President.*

____ ____,
*Secretary.*

Endorsed: "Filed Feb. 18, 1916, W. W. Nall, Clerk."

(*Separate Motion to Dismiss of Henry S. Priest and Clay A. Pierce, Trustees.*)

Now come Henry S. Priest and Clay Arthur Pierce, who are made defendants in the above entitled cause as Trustees and Agents for said Waters-Pierce Oil Company, by their solicitor, and file this, their separate motion to dismiss said cause, and for grounds therefor, state:

1. That the original petition in said cause does not state a cause of action or ground for recovery in equity against said defendants, or either of them.

10 2. That said original petition sets forth separate and distinct claims of different characters against the various defendants therein and is otherwise multifarious.

3. That there is a misjoinder of parties defendant in said original petition and cause, in that the claims or alleged causes of action do not affect all the defendants alike or in the same capacity.

4. That there is a misjoinder of claims or alleged causes of action in said original petition and cause, in that the causes of action against the various defendants are of a different nature and which are not cognizable in equity in the same action.

5. That it appears from the averments of said original petition, that defendants' liability or cause of action is asserted against the different defendants therein in this, that judgment is sought against the defendants, Henry S. Priest and Clay Arthur Pierce, for property and money of Waters-Pierce Oil Company alleged to be in their hands as liquidated agents of said company, while the judgment is sought to be obtained against the defendants Henry Clay Pierce, Pierce Investment Trust Company, and Clay Arthur Pierce, individually, as and for moneys of Waters-Pierce Oil Company alleged to have been paid to them respectively in liquidation and redemption of shares of stock held by them separately in said company.

6. That said original petition asserts a different cause of action against the different material defendants joined in the cause, without sufficient grounds being stated or appearing for so doing, contrary to the equity rules of this Court.

J. D. JOHNSON,
*Solicitor.*

Endorsed: "Filed Jun. 10, 1916, W. W. Nall, Clerk."

(*Separate Motion to Dismiss of Henry Clay Pierce and Pierce Investment Trust Co.*)

Now come Henry Clay Pierce and the Pierce Investment Trust Company, who are made defendants in the above entitled cause, as stockholders of said Waters Pierce Oil Company, by their solicitors,

and file this, their separate motion to dismiss said cause, and for grounds therefor, state:

1. That the original petition in said cause does not state a cause of action or ground for recovery in equity against said defendants, or either of them.

11 2. That said original petition sets forth separate and distinct claims of different characters against the various defendants therein and is otherwise multifarious.

3. That there is a misjoinder of parties defendant in said original petition and cause, in that the claims or alleged causes of action do not affect all the defendants alike or in the same capacity.

4. That there is a misjoinder of claims or alleged causes of action in said original petition and cause, in that the causes of action against the various defendants are of a different nature and which are not cognizable in equity in the same action.

5. That it appears from the averments of said original petition, that defendants' liability or cause *or* action is asserted against the different defendants therein in this, that judgment is sought against the defendant, Henry S. Priest and Clay Arthur Pierce, for property and money of Waters Pierce Oil Company alleged to be in their hands as liquidated agents of said Company, while the judgment is sought to be obtained against the defendants Henry Clay Pierce, Pierce Investment Trust Company, and Clay Arthur Pierce, individually, as and for moneys of Waters Pierce Oil Company alleged to have been paid to them respectively in liquidation and redemption of shares of stock held by them separately in said company.

6. That said original petition asserts a different cause of action against the different material defendants joined in the cause, without sufficient grounds being stated or appearing for so doing, contrary to the equity rules of this Court.

S. W. FORDYCE, JR.,
JOHN H. HOLLIDAY, &
THOS. W. WHITE,
*Solicitors for Henry Clay Pierce and Pierce Investment Trust Company.*

Endorsed: "Filed Jun. 10, 1916, W. W. Nall, Clerk."

(*Amended Motion to Dismiss of Henry Clay Pierce and Pierce Investment Trust Co.*)

Now come Henry Clay Pierce and the Pierce Investment Trust Company, who are made defendants in the above entitled cause, as stockholders of said Waters Pierce Oil Company, by their solicitors, and file this, their amended separate motion to dismiss said
12 cause, and for grounds therefor, state:

1. That the original petition in said cause does not state a cause of action or ground for recovery in equity against said defendant-, or either of them.

2. That said original petition sets forth separate and distinct claims of different characters against the various defendants therein and is otherwise multifarious.

3. That there is a misjoinder of parties defendant in said original petition and cause, in that the claims or alleged causes of action do not affect all the defendants alike or in the same capacity.

4. That there is a misjoinder of claims or alleged causes of action in said original petition and cause, in that the causes of action against the various defendants are of a different nature and which are not cognizable in equity in the same action.

5. That it appears from the averments of said original petition, that defendants' liability or cause of action is asserted against the different defendants therein in this that judgment is sought against the defendants, Henry S. Priest and Clay Arthur Pierce, for property and money of Waters Pierce Oil Company alleged to be in their hands, as liquidated agents of said Company, while the judgment is sought to be obtained against the defendants, Henry Clay Pierce, Pierce Investment Trust Company, and Clay Arthur Pierce, individually, as and for moneys of Waters Pierce Oil Company alleged to have been paid to them respectively in liquidation and redemption of shares of stock held by them separately in said Company.

6. That said original petition asserts a different cause of action against the different material defendants joined in the cause, without sufficient grounds being stated or appearing for so doing, contrary to the equity rules of this Court.

7. That it appears from the averments of the petition the action is for the recovery of a fine from these defendants, as and for the violation of a penal statute of the United States, and it therefore seeks to hold these defendants to answer for an infamous crime without a presentment or indictment of the Grand Jury,—contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

8. That it appears from the petition that the suit purports to be a proceeding in equity, while it also appears that the action is, in fact, for the recovery of a fine from these defendants for a violation
13 of a penal statute of the United States, and is, therefore, a criminal prosecution, and deprives these defendants of a trial therein by jury,—contrary to the provisions of the Sixth Amendment to the Constitution of the United States.

9. That according to the averments of the petition, the action is in the nature of a criminal proceeding against these defendants, and will compel them, by answering therein, to be wit-

nesses against themselves in a criminal case,—contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

10. That it appears from the averments of the petition, the rendering and enforcing of a judgment against these defendants for any part of the sum sued for in said cause would deprive them, and each of them, of their property without due process of law,—contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

S. W. FORDYCE, JR.,
JOHN H. HOLLIDAY, &
THOS. W. WHITE,
*Solicitors for Henry Clay Pierce and Pierce Investment Trust Company.*

Endorsed: "Filed Oct. 25, 1916, W. W. Nall, Clerk."

(*Amended Motion to Dismiss of H. S. Priest and C. A. Pierce.*)

Now at this day come Henry S. Priest and Clay Arthur Pierce, who are impleaded as defendants in the above entitled cause, by their solicitors, and by leave of court file this, their amended motion to dismiss said cause as against them; and for grounds therefor, state:

1. That the petition in said cause does not state facts sufficient to constitute a cause of action or ground for recovery in equity against said defendants or either of them.

2. That said petition sets forth separate and distinct claims or grounds of action of different character against the various defendants therein, and is otherwise multifarious.

3. That there is a misjoinder of parties defendant in said petition and suit, in that the claims or alleged causes of action do not affect all the defendants alike or in the same capacity.

14 4. That there is a misjoinder of claims or alleged causes of action in said petition and cause, in that the causes of action stated against the various defendants are of a different nature, and the same are not cognizable in equity in the same action.

5. That it appears from the petition, a different liability or cause of action is asserted against the different defendants therein, in this that judgment is sought to be obtained against the defendants, Henry S. Priest and Clay Arthur Pierce, jointly with the other defendants, as and for property and money of the Waters Pierce Oil Company alleged to be in the hands of these defendants as liquidating agents or trustees of said Company,—while judgment is also sought to be obtained against the defendants Henry Clay Pierce, Pierce Investment Trust Company and Clay Arthur Pierce, individually, and jointly with these defendants, as and for monies of said Waters

Pierce Oil Company alleged to have been paid to said other defendants, respectively, in liquidation and redemption of shares of stock held by them separately in said Company.

6. That the petition states and asserts a different cause of action against the different material defendants joined in the cause, without sufficient grounds being stated or appearing for so doing,—contrary to the equity rules of this court.

7. That it appears from the averments of the petition the action is for the recovery of a fine from these deefndants as and for the violation of a penal statute of the United States, and it therefore seeks to hold these defendants to answer for an infamous crime without a presentment or indictment of the Grand Jury,—contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

8. That it appears from the petition the suit purports to be a proceeding in equity; while it also appears that the action is, in fact, for the recovery of a fine from these defendants for a violation of a penal statute of the United States, and is therefore a criminal prosecution, and deprives these defendants of a trial therein by jury,—contrary to the provisions of the Sixth Amendment to the Constitution of the United States.

9. That according to the averments of the petition, the action is in the nature of a criminal proceeding against these defendants, and will compel them, by answering therein, to be witnesses against themselves in a criminal case,—contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

15 10. That it appears from the averments of the petition, the rendering and enforcing of a judgment against these defendants for any part of the sum sued for in said cause would deprive them and each of them, of their property without due process of law,—contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

11. That according to the averments of the petition, the United States accuses the various defendants of a conspiracy punishable by Section 37 of the Revised Penal Code of the United States (enacted March 4, 1909) and will compel them by answering therein to be witnesses against themselves in a criminal case—contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

HENRY S. PRIEST AND
CLAY ARTHUR PIERCE,
By J. D. JOHNSON AND
ALEXANDER B. SIEGEL,
*Solicitors for said Defendants.*

Plaintiff hereby acknowledges service of a copy of the foregoing amended motion to dismiss said cause, and consents to the filing of the same.

St. Louis, Missouri, October 27, 1916.

W. H. WOODWARD,
*Ass't U. S. Att'y.*

Endorsed: "Filed Oct. 27, 1916, W. W. Nall, Clerk."

(*Third Amended Motion to Dismiss of Henry Clay Pierce and Pierce Investment Trust Co.*)

Now come Henry Clay Pierce and the Pierce Investment Trust Company, who are made defendants in the above entitled cause, as stockholders of said Waters Pierce Oil Company, by their solicitors, and file this, their third amended separate motion to dismiss said cause, and for grounds therefor, state:

1. That the original petition in said cause does not state a cause of action or [ground] for recovery in equity against said defendants, or either of them.

2. That said original petition sets forth separate and distinct claims of different characters against the various defendants therein and is otherwise multifarious.

3. That there is a misjoinder of parties defendant in said original petition and cause, in that the claims or alleged causes of
16 action do not affect all the defendants alike or in the same capacity.

4. That there is a misjoinder of claims or alleged causes of action in said original petition and cause, in that the causes of action against the various defendants are of a different nature and which are not cognizable in equity in the same action.

5. That it appears from the averments of said original petition, that defendants' liability or cause of action is asserted against the different defendants therein in this, that judgment is sought against the defendants, Henry S. Priest and Clay Arthur Pierce, for property and money of Waters Pierce Oil Company alleged to be in their hands as liquidated agents of said company, while the judgment is sought to be obtained against the defendants, Henry Clay Pierce, Pierce Investment Trust Company, and Clay Arthur Pierce individually, as and for moneys of Waters Pierce Oil Company alleged to have been paid to them respectively in liquidation and redemption of shares of stock held by them separately in said company.

6. That said original petition asserts a different cause of action against the different material defendants joined in the cause, without sufficient grounds being stated or appearing for so doing, contrary to the equity rules of this Court.

7. That it appears from the averments of the petition the action is for the recovery of a fine from these defendants, as and for the violation of a penal statute of the United States, and it therefore seeks to hold these defendants to answer for an infamous crime without a presentment or indictment of the Grand Jury,—contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

8. That it appears from the petition that the suit purports to be a proceeding in equity, while it also appears that the action is, in fact, for the recovery of a fine from these defendants for a violation of a penal statute of the United States, and is, therefore, a criminal prosecution, and deprives these defendants of a trial therein by jury,—contrary to the provisions of the Sixth Amendment to the Constitution of the United States.

9. That according to the averments of the petition, the action is in the nature of a criminal proceeding against these defendants, and will compel them, by answering therein, to be witnesses against themselves in a criminal case,—contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

17 10. That it appears from the averments of the petition, the rendering and enforcing of a judgment against these defendants for any part of the sum sued for in said cause would deprive them, and each of them, of their property without due process of law,—contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

11. That according to the averments of the petition, the United States accuses the various defendants of a conspiracy punishable by Section 37 of the Revised Penal Code of the United States (enacted March 4, 1909) and will compel them by answering therein to be witnesses against themselves in a criminal case—contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

S. W. FORDYCE, Jr.,
J. H. HOLLIDAY &
THOS. W. WHITE,
*Solicitors for Henry Clay Pierce and Pierce Investment Trust Company.*

Service acknowledged.
10/31/16.

W. H. WOODWARD.

Endorsed: "Filed Oct. 31, 1916, W. W. Nall, Clerk."

(*Order of Submission of Motions to Dismiss, March* 1, 1917.)

Now at this day come the parties hereto by their respective solicitors and argue and submit to the Court the motions of defendants to dismiss in this cause.

(March 1st, 1917, David P. Dyer, Judge.)

(*Order of Submission of Motions to Dismiss Vacated, etc.*)

March 23, 1917.

On motion of said complainant, the Court doth

Order that the entry of submission of the motions to dismiss in this cause, be vacated, and that the said complainant be granted Twenty days from this date to file an amended bill herein.

(March 23rd, 1917, David P. Dyer, Judge.)

18 (*Amended Bill of Complaint.*)

To the Honorable the Judges of the District Court of the United States for the Eastern District of Missouri, sitting in Equity:

First Count.

The United States of America, by Arthur L. Oliver, United States Attorney for the Eastern District of Missouri, and Robert A. Hunter, Special Assistant to the Attorney General, bring this amended bill in equity against the Waters Pierce Oil Company, Henry S. Priest, Clay Arthur Pierce, Henry Clay Pierce, and Pierce Investment Trust Company, for the purpose of collecting a judgment obtained by the United States in the District Court of the United States for the Western District of Louisiana, which said judgment bears date of March 10, 1914, and is for the sum of Fourteen Thousand ($14,000.00) Dollars and costs, and, upon information and belief, plaintiff alleges and shows:

I.

That the Waters Pierce Oil Company is, and at all times herein mentioned was, a corporation duly organized, existing and doing business under and by virtue of the laws of Missouri, with its principal place of business at the City of Saint Louis, Missouri; That Pierce Investment Trust Company is, and at all times herein mentioned was, a corporation organized, existing and doing business under and by virtue of the laws of Missouri, with its principal place of business at Saint Louis, Missouri; and that Henry S. Priest, Clay Arthur Pierce, and Henry Clay Pierce, are all citizens of the State of Missouri and reside within the Eastern Division of the Eastern District of Missouri within the jurisdiction of this court.

II.

Plaintiff alleges that on January 29, 1907, at the January Term of the District Court of the United States for the Western District of Louisiana, held at the City of Alexandria, in said State, an indict-

ment was returned and filed against the Waters Pierce Oil Company, which said indictment was assigned number 1626 on the docket of said court, and charged the said defendant, Waters Pierce Oil Company, with receiving certain rebates and concessions in violation of the Elkins Act of February 19, 1903 (32 Stat. 847); that thereafter the said case, proceeding to trial on March 20, 1914, the jury returned a verdict of guilty upon which the court entered a judgment in favor of plaintiff, the United States of America,

19 for the sum of Fourteen Thousand ($14,000.00) — and costs; that thereafter, to wit, on April 21, 1914, the said Waters Pierce Oil Company was allowed a writ of error, without supersedeas, to the United States Circuit Court of Appeals for the Fifth Circuit, and, upon hearing duly had, the said Court of Appeals affirmed the judgment of the District Court, and the mandate of said Court of Appeals affirming said judgment was filed in the District Court aforesaid on June 23, 1915; that thereafter an execution upon said judgment was issued out of said District Court for the Western District of Louisiana, upon which said execution the United States Marshal for said Western District of Louisiana, on August 2, 1915, made a nulla bona return.

Plaintiff states that when the said Waters Pierce Oil Company was allowed a writ of error, as aforesaid, it furnished bond, with the American Surety Company of New York, as surety, for the costs of said prosecution; that after the said execution was returned nulla bona, as aforesaid, plaintiff sued out a rule against the said Waters Pierce Oil Company and the American Surety Company of New York to tax said costs and for judgment therefor against said surety, which said rule, after hearing in the United States District Court for the Western District of Louisiana was made absolute, and judgment was entered against the American Surety Company of New York for said costs; that the said surety company was allowed a writ of error to the United States Circuit Court of Appeals for the Fifth Circuit from said judgment, which said Court of Appeals affirmed the judgment of the District Court, and that after said litigation, and since the filing of the original bill herein, the said costs have been paid.

Plaintiff states that the judgment against the said Waters Pierce Oil Company for the sum of Fourteen Thousand ($14,000.00) Dollars, as above set forth, is final and has not been paid by the said Waters Pierce Oil Company, or any one for it either in whole or in part, said company having failed and refused, and still failing and refusing to pay said judgment or any part thereof.

Plaintiff further states that payment of the principal of said judgment was not, and is not, secured by bond, or in any other manner.

III.

Plaintiff further alleges that at an adjourned regular meeting of the Board of Directors of the Waters Pierce Oil Company held on July 9, 1913, at Number 420 Olive Street, in the City of Saint

Louis, Missouri, the said Board of Directors, pursuant to a request of holders of more than four-fifths of the capital stock of said corporation, did authorize the sale of all of the property of said corporation to the Pierce Oil corporation, a corporation organized under the laws of the State of Virginia, for and in consideration of Ten Million Five Hundred Thousand Dollars of the common capital stock of said Pierce Oil Corporation, and Five Million Dollars in cash of the lawful money of the United States; that Clay Arthur Pierce and Henry S. Priest were, by the said Board of Directors, appointed agents and trustees of the Waters Pierce Oil Company to receive from the Pierce Oil Corporation the consideration aforesaid. A copy of the minutes of the said meeting of the Board of Directors of the Waters Pierce Oil Company is hereunto annexed, marked Exhibit A, and made a part of this bill.

IV.

Plaintiff further alleges that pursuant to the authority granted them by the Board of Directors, as alleged in paragraph numbered III, Clay Arthur Pierce and T. F. Lyden, President and Secretary respectively of the Waters Pierce Oil Company, and acting for said Company, did, by an indenture dated July 7, 1913, and by other indentures, deeds and assignments, the date and character of which are to plaintiff unknown, convey to Pierce Oil Corporation all of its property and assets.

V.

Plaintiff avers that, pursuant to the authority granted them by the Board of Directors of the Waters Pierce Oil Company, as alleged in paragraph III, Henry S. Priest and Clay Arthur Pierce, as trustees and agents for said Waters Pierce Oil Company, did receive from the Pierce Oil Corporation Ten Million Five Hundred Thousand Dollars, par value, of the common stock of said Pierce Oil Corporation, and Five Million Dollars in cash, which said stock and money represented and was received by them in return for the total assets and property of the Waters Pierce Oil Company.

VI.

Plaintiff further avers that said Henry S. Priest and Clay Arthur Pierce now hold, as trustees for the said Waters Pierce Oil Company, certain moneys and certain stock of the Pierce Oil Corporation, the exact amount of either being to your petitioner unknown.

21 VII.

Plaintiff further avers that at the time of the transfer of its property and assets by the Waters Pierce Oil Company to the Pierce Oil Corporation, Henry Clay Pierce was the owner of two thousand,

seven hundred and twenty-seven shares of the common stock of the Waters Pierce Oil Company; and that the Pierce Investment Trust Company was the owner of one thousand shares of the common stock of the Waters Pierce Oil Company; and that Clay Arthur Pierce was the owner of one share of the common stock of the Waters Pierce Oil Company; and that they, and each of them, have received from Clay Arthur Pierce and Henry S. Priest certain proportions of the money and stock held by the said Henry S. Priest and Clay Arthur Pierce as trustees for the Waters Pierce Oil Company, as alleged in paragraph V.

Plaintiff states that it is informed and believes that Henry Clay Pierce received the sum of Three Million, Four Hundred and Eight Thousand, Seven Hundred and Fifty Dollars; and that Pierce Investment Trust Company received the sum of One Million, Two Hundred and Fifty Thousand Dollars; and that Clay Arthur Pierce received the sum of One Thousand, Two Hundred and Fifty Dollars, from the said Henry S. Priest and Clay Arthur Pierce, trustees as aforesaid.

VIII.

Plaintiff states that the exact amount of moneys and stock now held by the said Henry S. Priest and Clay Arthur Pierce, in their capacity as trustees for the Waters Pierce Oil Company, and the exact sums received from said trustees by the said Henry Clay Pierce, Pierce Investment Trust Company and Clay Arthur Pierce, as hereinabove alleged, are well known to the said defendants, and are unknown to plaintiff, except as hereinabove set forth on information and belief, and, therefore, a full discovery from said defendants is herein sought.

IX.

Plaintiff further avèrs that on March 19, 1917, execution upon the judgment of plaintiff set out in paragraph II, was issued out of the United States District Court for the Western District of Louisiana directed to the United States Marshal for the Eastern District of Missouri, and that thereafter, to-wit, on March 28, 1917, said Marshal made a nulla bona return on said execution and filed the said writ and return in the office of the Clerk of the United States District Court for the Western District of Louisiana on March 31, 1917.

22 X.

Plaintiff further avers that the Waters Pierce Oil Company has no assets out of which a judgment could be collected; that the said transfer to the Pierce Oil Corporation was of all of its assets and property, and left it, the said Waters Pierce Oil Company, without any means or power to meet its outstanding obligations, including said judgment due to plaintiff, and that said Company ceased to do business on said transfer and is no longer a going concern.

Plaintiff states that in equity and good conscience the money received from the sale of the assets of the Waters Pierce Oil Company and now in the hands of its stockholders, agents and trustees, as herein alleged, ought to be subjected to the payment of the judgment of your plaintiff set out in paragraph II.

## XI.

In consideration whereof and forasmuch as plaintiff is without a plain, adequate and complete remedy in the premises save in a court of equity, plaintiff prays:

1. That writs of subpœna issue directed to defendants, Waters Pierce Oil Company, Henry S. Priest, Clay Arthur Pierce, Henry Clay Pierce, and Pierce Investment Trust Company, commanding each of them to appear herein and answer the allegations contained in the foregoing bill of complaint, and abide by and perform such orders and decrees as the court may make in the premises.

2. That the court adjudge and decree that the Waters Pierce Oil Company has no assets subject to execution out of which plaintiff's judgment may be collected.

3. That an accounting may be had by said defendants, Henry S. Priest and Clay Arthur Pierce, of all stock and moneys received by them in their capacity as trustees of the Waters Pierce Oil Company, and of the disposition thereof, as well as of all stock and moneys now held by them as trustees aforesaid, and that the said Henry Clay Pierce, Clay Arthur Pierce and the Pierce Investment Trust Company be required to make an accounting of all stock and moneys received by them as stockholders of the Waters Pierce Oil Company from the said trustees.

4. That the court adjudge and decree that the money and property received from the Pierce Oil Corporation and in the hands of Clay Arthur Pierce and Henry S. Priest is held in trust by them for the benefit of the Waters Pierce Oil Company and should
23 be subjected to the payment of the debts and liabilities of the Waters Pierce Oil Company, and more particularly the judgment of plaintiff.

5. That during the pendency of this suit the defendants, Henry S. Priest and Clay Arthur Pierce, be restrained from conveying or assigning any money or property held by them as trustees or agents of the Waters Pierce Oil Company.

6. That the court adjudge and decree that Henry Clay Pierce, Pierce Investment Trust Company and Clay Arthur Pierce received moneys and property derived from the sale of the assets of the Waters Pierce Oil Company, and that the same be subjected to the payment of the debts and liabilities of the Waters Pierce Oil Company, and, more particularly, the judgment of plaintiff.

7. That plaintiff have judgment against defendants for the sum of Fourteen Thousand ($14,000.00) Dollars, being the amount of the judgment referred to in paragraph II of this bill.

8. For such other orders and decrees, the premises considered, as may be in equity meet and proper.

ARTHUR L. OLIVER,
*United States Attorney.*
ROBERT A. HUNTER,
*Special Assistant to the Attorney General.*
W. H. WOODWARD,
*Assistant United States Attorney.*

UNITED STATES OF AMERICA,
*Western District of Louisiana, ss:*

Before me, the undersigned authority, personally appeared Robert A. Hunter, who, being by me first duly sworn, deposes and says that he is a Special Assistant to the Attorney General of the United States, and that he brings this amended bill of complaint for and on behalf of the United States of America; that he has read the foregoing amended bill of complaint and knows the contents thereof and that the same is true, of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

ROBERT A. HUNTER.

24 Sworn to and subscribed before me this 17th day of August, 1917.

[SEAL.]

W. B. LEE,
*Clerk United States District Court,*
*Western District of Louisiana.*

(*Order Allowing Amended Bill of Complaint to be Filed, etc.*)

The foregoing amended bill of complaint being considered, it is ordered that the same be filed, and that a copy, issued and certified under the hand and seal of the Clerk of this Court, of the said amended bill of complaint, be served, together with a subpœna in chancery, on each of the said defendants.

Thus done and signed this 22 day of August, 1917.

(Signed)

DAVID P. DYER,
*Judge United States District Court,*
*Eastern District of Missouri.*

Endorsed: "Filed Aug. 23, 1917, W. W. Nall, Clerk."

*(Separate Motion to Dismiss of Henry Clay Pierce and Pierce Investment Trust Co.)*

Now come Henry Clay Pierce and the Pierce Investment Trust Company, who are made defendants in the above entitled cause, as stockholders of said Waters Pierce Oil Company, by their solicitors, and file this, their separate motion to dismiss said cause, and for grounds therefor, state

1. That the first amended petition in said cause does not state a cause of action or ground for recovery in equity against said defendants, or either of them.

2. That said petition sets forth separate and [distince] claims of different characters against the various defendants therein and is otherwise multifarious.

3. That there is a misjoinder of parties defendant in said petition and cause, in that the claims or alleged causes of action do not affect all the defendants alike or in the same capacity.

4. That there is a misjoinder of claims or alleged causes of action in said petition and cause, in that the causes of action against the various defendants are of different nature and which are not cognizable in equity in the same action.

5. That it appears from the averments of said petition, that defendants' liability or cause of action is asserted against the different defendants therein in this, that judgment is sought against the defendants, Henry S. Priest and Clay Arthur Pierce, for property and money of Waters Pierce Oil Company alleged to be in their hands as liquidated agents of said Company, while the judgment is sought to be obtained against the defendants, Henry Clay Pierce, Pierce Investment Trust Company, and Clay Arthur Pierce, individually, as and for moneys of Waters Pierce Oil Company alleged to have been paid to them respectively in liquidation and redemption of shares of stock held by them separately in said Company.

6. That said petition asserts a different cause of action against the different material defendants joined in the cause, without sufficient grounds being stated or appearing for so doing, contrary to the equity rules of this Court.

7. That it appears from the averments of said petition the action is for the recovery of a fine from these defendants, as and for the violation of a penal statute of the United States, and it therefore seeks to hold these defendants to answer for an infamous crime without a presentment or indictment of the Grand Jury,—contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

8. That it appears from said petition that the suit purports to be a proceeding in equity, while it also appears that the action is, in

fact, for the recovery of a fine from these defendants for a violation of a penal statute of the United States, and is, therefore, a criminal prosecution, and deprives these defendants of a trial therein by jury,—contrary to the provisions of the Sixth Amendment to the Constitution of the United States.

9. That according to the averments of said petition, the action is in the nature of a criminal proceeding against these defendants, and will compel them, by answering therein, to be witnesses against themselves in a criminal case,—contrary to the provisions of the Fifth Amendment of the Constitution of the United States.

10. That it appears from the averments of said petition the rendering and enforcing of a judgment against these defendants for any part of the sum sued for in said cause would deprive
26 them, and each of them, of their property without due process of law,—contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

11. That according to the averments of said petition, the United States accuses the various defendants of a conspiracy punishable by section 37 of the Revised Penal Code of the United States (enacted March 4, 1909) and will compel them by answering therein to be witnesses against themselves in a criminal case—contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

S. W. FORDYCE, JR.,
J. H. HOLLIDAY, &
THOS. W. WHITE,
*Solicitors for Henry Clay Pierce and Pierce Investment Trust Company.*

Endorsed: "Filed Sep. 24, 1917, W. W. Nall, Clerk."

*(Separate Motion to Dismiss of Henry S. Priest and Clay A. Pierce.)*

Now come Henry S. Priest and Clay Arthur Pierce, defendants in the above entitled cause, and file this their separate motion to dismiss said cause, and for grounds therefor, state:

1. That the first amended petition in said cause does not state a cause of action or ground for recovery in equity against said defendants, or either of them.

2. That said petition sets forth separate and distinct claims of different characters against the various defendants therein and is otherwise multifarious.

3. That there is a [misjoin-er] of parties defendant in said petition and cause, in that the claims or alleged causes of action do not affect all the defendants alike or in the same capacity.

4. That there is a misjoinder of claims or alleged causes of action in said petition and cause, in that the causes of action against the

various defendants are of different nature and which are not cognizable in equity in the same action.

5. That it appears from the averments of said petition, that defendants' liability or cause of action is asserted against the different defendants therein in this, that judgment is sought against the defendants, Henry S. Priest and Clay Arthur Pierce, for property and money of Waters Pierce Oil Company alleged to be in their
27 hands as liquidated agents of said Company, while the judgment is sought to be obtained against the defendants, Henry Clay Pierce, Pierce Investment Trust Company, and Clay Arthur Pierce, individually, as and for moneys of Waters Pierce Oil Company alleged to have been paid to them respectively in liquidation and redemption of shares of stock held by them separately in said Company.

6. That said petition asserts a different cause of action against the different material defendants joined in the cause, without sufficient grounds being stated or appearing for so doing, contrary to the equity rules of this Court.

7. That it appears from the averments of said petition the action is for the recovery of a fine from these defendants, as and for the violation of a penal statute of the United States, and it therefore seeks to hold these defendants to answer for an infamous crime without a presentment or indictment of the Grand Jury, contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

8. That it appears from said petition that the suit purports to be a proceeding in equity, while it also appears that the action is, in fact, for the recovery of a fine from these defendants for a violation of a penal statute of the United States, and is, therefore, a criminal prosecution, and deprives these defendants of a trial therein by a jury, contrary to the provisions of the Sixth Amendment to the Constitution of the United States.

9. That according to the averments of said petition, the action is in the nature of a criminal proceeding against these defendants, and will compel them by answering therein, to be witnesses against themselves in a criminal case, contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

10. That it appears from the averments of said petition, the rendering and enforcing of a judgment against these defendants for any part of the sum sued for in said cause would deprive them, and each of them, of their property without due process of law, contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

11. That according to the averments of said petition, the United States accuses the various defendants of a conspiracy punishable by section 37 of the Revised Penal Code of the United States (enacted

March 4, 1909) and will compel them by answering therein
28 to be witnesses against themselves in a criminal case, contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

VAN VORST, MARSHALL & SMITH,
BOYLE & PRIEST,
*Solicitors for Henry S. Priest and Clay Arthur Pierce.*

Endorsed: "Filed Sep. 26, 1917, W. W. Nall, Clerk."

(*Order of Submission of Motions to Dismiss, October* 17, 1917.)

Now at this day come the parties hereto by their respective solicitors, and argue and submit to the Court the joint motion to dismiss filed by the defendants, Henry S. Priest and Clay Arthur Pierce, and the joint motion to dismiss filed by the defendants, Henry Clay Pierce and the Pierce Investment Trust Company.
(October 17th, 1917, David P. Dyer, Judge.)

(*Order Overruling Motions to Dismiss.*)

Upon consideration of the Motion to dismiss of Henry S. Priest and Clay Arthur Pierce, and the Motion to dismiss of Henry Clay Pierce and the Pierce Investment Trust Company, heretofore filed and submitted to the Court, the Court doth
Order that said motions to dismiss be and the same are hereby overruled.

(Signed) DAVID P. DYER,
*Judge.*

St. Louis, Missouri, November thirteenth, 1917.

Endorsed: "Filed Nov. 13, 1917, W. W. Nall, Clerk."

*Separate Answer of Henry Clay Pierce and Pierce Investment Trust Company.*

Now come Henry Clay Pierce and Pierce Investment Trust Company and file their separate answer to the first amended bill of plaintiff in the above entitled cause.

I.

Said defendants admit the incorporation of the Waters
29 Pierce Oil Company and the Pierce Investment Trust Company, as alleged in the first paragraph of said first amended bill, but deny the other allegations in said paragraph one.

II.

Said defendants deny the allegations set forth in paragraph two of said amended bill.

III.

Said defendants deny the allegations set forth in paragraph three of said amended bill.

IV.

Said defendants deny the allegations set forth in paragraph four of said amended bill.

V.

Said defendants deny the allegations set forth in paragraph five of said amended bill.

VI.

Said defendants deny the allegations set forth in paragraph three of said amended bill.

VII.

Said defendants deny the allegations set forth in paragraph seven of said amended bill.

VIII.

Said defendants deny the allegations set forth in paragraph eight of said amended bill.

IX.

Said defendants deny the allegations set forth in paragraph nine of said amended bill.

X.

Said defendants deny the allegations set forth in paragraph ten of said amended bill.

XI.

Said defendants deny the allegations set forth in paragraph eleven of said amended bill.

XII.

Said defendants, for further answer, state that the first amended bill in said cause does not state a cause of action or ground for recovery in equity against said defendants, or either of them.

30

XIII.

Said defendants for further answer, state that said amended bill sets forth separate and distinct claims of different characters against the various defendants therein and is otherwise multifarious.

XIV.

Said defendants, for further answer, state that there is a misjoinder of parties defendant in said amended bill and cause, in that the claims or alleged causes of action do not affect all the defendants alike or in the same capacity.

XV.

Said defendants, for further answer, state that there is a misjoinder of claims or alleged causes of action in said amended bill and cause, in that the causes of action against the various defendants are of different nature and which are not cognizable in equity in the same action.

XVI.

Said defendants, for further answer, state that it appears from the averments of said amended bill that defendants' liability or cause of action is asserted against the different defendants therein, in this: that judgments is sought against the defendants, Henry S. Priest and Clay Arthur Pierce for property and money of Waters Pierce Oil Company, alleged to be in their hands as liquidated agents of said company, while the judgment is sought to be obtained against the defendants, Henry Clay Pierce, Pierce Investment Trust Company, and Clay Arthur Pierce, individually, as and for moneys of Waters Pierce Oil Company, alleged to have been paid to them respectively in liquidation and redemption of shares of stock held by them separately in said company.

XVII.

Said defendants, for further answer, state that said amended bill asserts a different cause of action against the different material defendants joined in the cause, without sufficient grounds being stated or appearing for so doing, contrary to the Equity Rules of this Court.

XVIII.

Said defendants, for further answer, state that it appears from the averments of said amended bill the action is for the recovery of a fine from these defendants, as and for the violation of a penal statute of the United States and it therefore seeks to hold these
31 defendants to answer for an infamous crime without a presentment or indictment of the Grand Jury, contrary to the

provisions of the Fifth Amendment to the Constitution of the United States.

XIX.

Said defendants, for further answer, state that it appears from said amended bill that the suit purports to be a proceeding in equity, while it also appears that the action is, in fact, for the recovery of a fine from these defendants for the violation of a penal statute of the United States and is, therefore, a criminal prosecution, and deprives these defendants of a trial therein by jury, contrary to the provisions of the Sixth Amendment to the Constitution of the United States.

XX.

Said defendants, for further answer, state that according to the averments of said amended bill, the action is in the nature of a criminal proceeding against these defendants, and will compel them, by answering therein, to be witnesses against themselves in a criminal case, contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

XXI.

Said defendants, for further answer, state that it appears from the averments of said amended bill the rendering and enforcing of a judgment against these defendants for any part of the sum sued for in said cause would deprive them, and each of them, of their property without due process of law, contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

XXII.

Said defendants, for further answer, state that according to the averments of said amended bill, the United States accuses the various defendants of a conspiracy punishable by section 37 of the Revised Penal Code of the United States (enacted March 4, 1909) and will compel them by answering therein to be witnesses against themselves in a criminal case—contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

XXIII.

Said defendants, for further answer, state that all of the stockholders of said Waters Pierce Oil Company are necessary and proper parties to this proceeding, that this cause should not proceed
32 without said stockholders be brought in as such parties, and that proceeding without them would be inequitable and unjust to the present defendants and would result in a multiplicity of suits.

## XXIV.

Said defendant-, for further answer, states that the United States of America, brought suit on January 4th 1916 in the District Court of the United States for the Western District of Louisiana against the Pierce Oil Corporation in a suit styled United States of America, Plaintiff vs. Waters Pierce Oil Company, in equity 1080; that in said suit, the plaintiff seeks to recover against the Pierce Oil Corporation, a corporation of the State of Virginia, the judgment entered against the Waters Pierce Oil Company on March 20th 1914, being the identical judgment referred to in the first amended bill of the plaintiff in the present case; that in said suit in the District Court of the United States for the Western District of Louisiana, it is alleged that the Pierce Oil Corporation had taken over the property and assets of the Waters Pierce Oil Company and in consideration of the transfer of said property and assets of the Waters Pierce Oil Company to the Pierce Oil Corporation, the Pierce Oil Corporation gave the Waters Pierce Oil Company Ten Million Five Hundred Thousand Dollars ($10,500,000) in par value of capital stock of the Pierce Oil Corporation and Five Million Dollars ($5,000,000) in cash and assumed all debts, liabilities and obligations of said Waters Pierce Oil Company; that on account of said transfer of property and assets and on account of said assumption by the Pierce Oil Corporation of debts, liabilities and obligations of the Waters Pierce Oil Corporation, the United States in said District Court of the Western District of Louisiana, is seeking to hold the Pierce Oil Corporation for the payment of said judgment, and said suit is still pending undetermined.

Said defendant- further states that on account of the matters and things aforesaid, the United States of America is forever barred from proceeding with the present case; that said matters constitute an election of remedies, a waiver, and an estoppel; and that the plaintiff in the present case has an adequate remedy at law and hence there is no equity in the first amended bill filed herein.

33 Wherefore, having fully answered, said defendants pray to be dismissed with their proper costs.

S. W. FORDYCE, Jr.,
J. H. HOLLIDAY &
THOS. W. WHITE,
*Solicitors for Defendants, Henry Clay Pierce and Pierce Investment Trust Company.*

1/30/18.

Plaintiff consents to filing of above answer out of time.

W. H. WOODWARD,
*Ass't U. S. Att'y for Plaintiff.*

Endorsed: "Filed Jan. 30, 1918, W. W. Nall, Clerk."

*(Order of Submission of Cause on Stipulation and Agreed Statement of Facts.)*

Now at this day come the parties hereto by their respective solicitors and submit this cause to the Court upon the stipulation and agreed statement of facts now filed herein.

(March 9th, 1918, David P. Dyer, Judge.)

*(Stipulation and Agreed Statement of Facts.)*

Filed in the U. S. District Court March 9, 1918.

It is agreed and understood, by and between Counsel for plaintiff, and Counsel for defendants, that the following facts are true, and the said cause shall be tried upon said facts, and no testimony shall be offered by either party.

I.

That the Waters Pierce Oil Company is, and at all times herein mentioned, was a corporation duly organized, existing and doing business under and by virtue of the laws of Missouri, with its principal place of business at the City of Saint Louis, Missouri; that Pierce Investment Trust Company is, and at all times herein mentioned, was a corporation organized, existing and doing business under and by virtue of the laws of Missouri, with its principal place of business at Saint Louis, Missouri; and that Henry S. Priest, Clay Arthur Pierce and Henry Clay Pierce, were at the time of filing and
34 service of this suit, citizens of the State of Missouri, and resided within the Eastern Division of the Eastern District of Missouri, and within the jurisdiction of this Court.

II.

It is admitted that on January 29th, 1907, at the January Term of the District Court of the United States for the Western District of Louisiana, held at the City of Alexandria, in said State, an indictment was returned and filed against the Waters Pierce Oil Company, which said indictment was assigned number 1626 on the docket of said Court, and charged the said defendant, Waters Pierce Oil Company, with receiving certain rebates and concessions in violation of the Elkins Act of February 19, 1903, (32 Stat. 847); that thereafter, the said case proceeding to trial on March 20, 1914, the jury returned a verdict of guilty upon which the Court entered a judgment in favor of plaintiff, the United States of America, for the sum of Fourteen thousand dollars ($14,000.00) and costs; that thereafter, to-wit, on April 21, 1914, the said Waters Pierce Oil Company was allowed a writ of error, without supersedeas, to the United States Circuit Court of Appeals for the Fifth Circuit, and, upon hearing duly had, the said Court of Appeals affirmed the judg-

ment of the District Court, and the mandate of said Court of Appeals affirming said judgment was filed in the District Court aforesaid, on June 23, 1915; that thereafter, an execution upon said judgment was issued out of said District Court for the Western District of Louisiana, upon which said execution the United States Marshal for said Western District of Louisiana, on August 2, 1915, made a nulla bona return.

It is admitted that when the said Waters Pierce Oil Company was allowed a writ of error, as aforesaid, it furnished bond, with the American Surety Company of New York, as surety, for the costs of said prosecution; that after the said execution was returned nulla bona, as aforesaid, plaintiff sued out a rule against said Waters Pierce Oil Company and the American Surety Company of New York to tax said costs and for judgment therefor against said surety, which said rule, after hearing in the United States District Court for the Western District of Louisiana was made absolute, and judgment was entered against the American Surety Company of New York for said costs; that the said Surety Company was allowed a writ of error to the United States Circuit Court of Appeals for the Fifth Circuit from said judgment, which said Court of Appeals
35 affirmed the judgment of the District Court, and that after said litigation, and since the filing of the original bill herein, the said costs have been paid.

It is further admitted that the judgment against the said Waters Pierce Oil Company for the sum of Fourteen Thousand Dollars ($14,000.00) as above set forth, is final, and has not been paid by the said Waters Pierce Oil Company, or any one for it, either in whole or in part, said company having failed and refused, and still failing and refusing to pay said judgment or any part thereof.

It is further admitted that payment of the principal of said judgment was not, and is not, secured by any bond whatever.

III.

It is admitted that at an adjourned regular meeting of the Board of Directors of the Waters Pierce Oil Company, held on July 9, 1913, at Number 420 Olive Street, in the City of Saint Louis, Missouri, the said Board of Directors, pursuant to a request of holders of more than four-fifths of the capital stock of said corporation, did authorize the sale of all the property of said corporation to the Pierce Oil Corporation, a corporation organized under the laws of the State of Virginia, for and in consideration of Ten Million, Five Hundred Thousand Dollars ($10,500,000.00), of the common capital stock of said Pierce Oil Corporation, and Five Million Dollars ($5,000,000.00) in cash of the lawful money of the United States; that Clay Arthur Pierce and Henry S. Priest were, by the said Board of Directors, appointed Agents and Trustees of the Waters Pierce Oil Company, to receive from the Pierce Oil Corporation, the consideration aforesaid. A copy of the minutes of the said meeting of the Board of Directors of the Waters Pierce Oil Company, is

hereunto annexed, marked Exhibit A, and made a part of this stipulation of facts.

IV.

It is further admitted that pursuant to the authority granted them by the Board of Directors, as set forth in paragraph numbered III, Clay Arthur Pierce and T. F. Lyden, President and Secretary, respectively, of the Waters Pierce Oil Company, and acting for said Company did, by an indenture dated July 7, 1913, and by other indentures, deeds and assignments, convey to Pierce Oil Corporation, all of its property and assets.

V.

It is further admitted that pursuant to the authority granted them by the Board of Directors of the Waters Pierce
36 Oil Company, as set forth in paragraph III, Henry S. Priest and Clay Arthur Pierce, as Trustees and Agents for said Waters Pierce Oil Company, did receive from the Pierce Oil Corporation, Ten Million, Five Hundred Thousand Dollars ($10,500,000.00), par value, of the common stock of said Pierce Oil Corporation, and Five Million Dollars ($5,000,000.00) in cash, which said stock and money represented, and was received by them, in return for the total assets and property of the Waters Pierce Oil Company.

VI.

It is admitted that at the time of the transfer of its property and assets by the Waters Pierce Oil Company, to the Pierce Oil Corporation, Henry Clay Pierce was the owner of Two Thousand, Seven Hundred and Twenty-seven (2,727) shares of the common stock of the Waters Pierce Oil Company; that the Pierce Investment Trust Company was the owner of One Thousand (1,000) shares of the common stock of the Waters Pierce Oil Company, and that Clay Arthur Pierce was the owner of one (1) share of the common stock of the Waters Pierce Oil Company, the total number of shares of stock issued by said Company, and outstanding, being Four Thousand (4,000), and that they and each of them received from Clay Arthur Pierce and Henry S. Priest, certain proportions of the money and stock held by the said Henry S. Priest and Clay Arthur Pierce, as Trustee for the Waters Pierce Oil Company, which said amounts so received by them, were as follows, to-wit:

Henry Clay Pierce received the sum of Three Million, Four Hundred and Eight Thousand, Seven Hundred and Fifty Dollars ($3,408,750.00); and that Pierce Investment Trust Company received the sum of One Million, Two Hundred and Fifty Thousand Dollars ($1,250,000.00); and that Clay Arthur Pierce received the sum of One Thousand, Two Hundred and Fifty Dollars ($1,250.00), from the said Henry S. Priest and Clay Arthur Pierce, Trustees as

aforesaid, and likewise received stock of the Pierce Oil Corporation, in the amounts set opposite their names as follows:

| | Number of shares. | Value. |
|---|---|---|
| Henry Clay Pierce | 71,583¾ | $7,158,375.00 |
| Pierce Investment Trust Company | 26,250 | 2,625,000.00. |
| Clay Arthur Pierce | 26¼ | 2,625.00 |

37

VII.

It is admitted that on March 19, 1917, execution upon the judgment of plaintiff set out in paragraph II, of this stipulation of facts, was issued out of the United States District Court for the Western District of Louisiana, directed to the United States Marshal for the Eastern District of Missouri, and that thereafter, to-wit, on March 28, 1917, said Marshal made a nulla bona return on said execution and filed the said writ and return in the office of the Clerk of the United States District Court for the Western District of Louisiana, on March 31, 1917.

VIII.

It is admitted that the Waters Pierce Oil Company has no assets out of which a judgment could be collected; that the said transfer to the Pierce Oil Corporation was of all of its assets and property, and left it, the said Waters Pierce Oil Company without any means or power to meet said judgment due to plaintiff, and that said Company ceased to do business on said transfer, and is no longer a going concern.

IX.

In the verified answer of Henry S. Priest and Clay Arthur Pierce, Trustees of the Waters Pierce Oil Company, it is alleged that all of the money and stock received by said Trustees from the Pierce Oil Corporation, was distributed by them among the stockholders of the Waters Pierce Oil Company, prior to the filing of this suit. Plaintiff does not controvert, and has no means of controverting said allegations, and, hence, the statement thus made under oath by said Trustees, in so far as it relates to the disposition of such money and stock before the institution of this suit, is admitted.

X.

It is admitted that on February 4, 1916, there was filed by the United States in the District Court of the United States, for the Western District of Louisiana, a bill of complaint against the Pierce

Oil Corporation, a certified copy of which, and a certified copy of the answer of the said Pierce Oil Corporation, are hereto annexed, and made a part of this stipulation of facts, and that said cause is now pending. This admission is made subject to the objection now urged by plaintiff to the relevancy, competency and admissibility of said facts. Plaintiff, while admitting the filing of said suit as a fact, objects to the relevancy thereof, and contends that the same is immaterial to the issues in this cause.

38 XI.

The facts herein set forth, are considered as all the facts in the case, and are admitted only for the purpose of this case, and not otherwise.

XII.

It is further agreed, that [*that*] this cause shall be submitted to the District Court, without argument, upon the pleadings and stipulation of facts herein above set forth, and that this stipulation of facts shall likewise be considered as the true facts for all purposes in the District Court, and in any Appellate Court to which the cause may be taken on appeal.

XIII.

It is agreed that this statement of facts shall not be construed as a waiver on the part of the defendants, of any issues of law raised by them in their motions to dismiss filed herein, and which were overruled by the Court, the said defendants expressly reserving all of their rights under said motions.

Dated at Shreveport, Louisiana, this 22nd day of February, 1918.

ROBERT A. HUNTER,
*Special Assistant to the Attorney General.*

Dated at St. Louis, Missouri, this 9 day of March, 1918.

W. H. WOODWARD,
*Attorneys for Plaintiff.*

Dated at New York, New York, this 18th day of February, 1918.

J. MARKHAM MARSHALL,
*Attorney for H. S. Priest and Clay Arthur Pierce, Individually.*

Dated at St. Louis, Missouri, this 15 day of January, 1918.

FORDYCE, HOLLIDAY & WHITE,
*Attorneys for H. C. Pierce & Pierce Investment Trust Co.*

Dated at St. Louis, Missouri, this 14th day of January, 1918.

BOYLE & PRIEST,
*Attorneys for Trustees.*

39 EXHIBIT A.

*(Minutes of the Meeting of the Board of Directors of Waters Pierce Oil Company, July 9, 1913.)*

Office of Waters Pierce Oil Company.

ST. LOUIS, Mo., July 9, 1913.

The adjourned regular monthly meeting of the Board of Directors of the Waters Pierce Oil Company was held at the Company's office, #420 Olive Street, in the City of St. Louis, at eleven o'clock A. M., this, the 9th day of July, 1913, as per adjournment on the 7th inst.

There were present and participated in the meeting the following Directors,—Andrew M. Finlay, Thomas F. Lydon and J. A. Steward.

The Chairman of the Board and President being absent, Mr. Andrew M. Finlay, Vice President, presided; and Thomas F. Lydon, Secretary, acted in that capacity.

Minutes of the meeting held on the 7th instant were read and approved.

Vice President Finlay stated to the Board that the Pierce Oil Corporation had been formed under the laws of the State of Virginia, and was prepared to take over all of the property and assets of this corporation, giving to this corporation $10,500,000 in par value of the capital stock of said Pierce Oil Corporation, $5,000,000 in cash, in lawful money of the United States, and assuming all of the debts, liabilities and obligations of this corporation. Vice President Finlay stated further that the holders of more than four-fifths of the stock of this corporation had, in writing, requested the Board of Directors to make such transfer, and he duly presented such request in writing to the Board of Directors.

It was, on motion duly seconded, ordered that such request be received, and be spread on the minutes of this meeting as a part thereof, which is accordingly done as follows, viz:

"ST. LOUIS, Mo., July 7, 1913.

"We, the undersigned stockholders of Waters Pierce Oil Company, a corporation organized under the laws of the State of Missouri, comprising the holders of more than four-fifths of the capital stock of said Corporation, hereby do request, authorize and direct the Board of Directors of said Corporation to transfer all of
40 the assets of said Corporation, including all of its real, personal and mixed property, and chattels real, corporeal and incorporeal, of every name and nature, to Pierce Oil Corporation, a corporation organized and existing under the laws of the State of Virginia, in return for $10,500,000 par value of the common capital stock of said Corporation, $5,000,000 in cash in lawful money of the United States, and the assumption by said Pierce Oil Corporation of

all of the debts, liabilities and obligations of the Waters Pierce Oil Company.

"This instrument may be signed in more than one original counterpart and all original counterparts together shall be and be deemed to be a single instrument.

"In witness whereof, the undersigned have personally or by their respective duly constituted attorneys hereto subscribed their names, and written opposite thereto the number of shares held and owned by them in the said Waters Pierce Oil Company.

"Witness
"ALEXANDER B. SIEGEL.

"H. C. PIERCE, 2727 Shares,
By EBEN RICHARDS, *Att'y.*
"PIERCE INVESTMENT TRUST COMPANY, 1000 Shares,
By JOSEPH A. STEWARD, *Secretary.*
"ANDREW M. FINLEY, 1 Share,
"T. F. LYDON, 1 share,
"J. A. STEWARD, 1 share,
"CLAY ARTHUR PIERCE; 1 share."

The following preamble and resolutions were then moved, seconded and unanimously adopted:

"Whereas, Pierce Oil Corporation, a corporation organized under the laws of the State of Virginia, desires to purchase and take over all of the property and assets of this corporation, giving to this corporation $10,500,000 par value of the common capital stock of the Pierce Oil Corporation, $5,000,000 in cash in lawful money of the United States, and assuming all of the debts, liabilities and obligations of this corporation, and

"Whereas, the Board of Directors has been requested, authorized and directed in writing by stockholders of this Com-
41 pany holding more than four-fifths of its capital stock to make such sale and transfer upon such terms, and

"Whereas, the Board of Directors approve of such transfer upon such terms: Therefore be it

"Resolved, that all of the real, personal and mixed property, and chattels real, corporeal and incorporeal of this corporation, including all of its lands, tenements, and hereditaments, of whatsoever name and nature, leases, mining claims denouncements, prospects for oil and other mineral, easements, profits, covenents, warranties, licenses, permits, rights and choses in action in respect of real property and chattels real, and each and every other right, title or interest which it may now have or hereafter acquire in respect of real property, corporeal or incorporeal, and all chattels real, wherever situated, together with all fixtures and articles or personal property used on or in connection with its said real property and chattels real, and all of its chattels, goods, merchandise, machinery, tools supplies,

accounts, bills, notes, moneys, stocks, bonds, mortgages, credits, patents, trade marks, copyrights, trade names, good-will, rights and property, corporeal and incorporeal, of every kind, which this corporation now has or hereafter may acquire, the whole to be transferred as a going concern, in return for $10,500,000 of the common capital stock of the said Pierce Oil Corporation, $5,000,000 in cash in lawful money of the United States, and the assumption by said Pierce Oil Corporation of all of the debts, obligations and liabilities of this corporation;

"Resolved, that Clay Arthur Pierce, President; Andrew M. Finley, Vice President; Thomas F. Lydon, Secretary, and the other officers of this corporation be, and they hereby are respectively authorized and directed to do all and all manner of things, and to make, execute and deliver all and all manner of deeds, conveyances and other instruments as may be necessary, desirable or convenient to carry out the intent of these resolutions;

"Resolved, that Clay Arthur Pierce and Henry S. Priest be appointed agents and trustees of this corporation to receive for it the said $10,500,000 par value of the shares of the common capital stock of the Pierce Oil Corporation, the said $5,000,000 in cash, and any and all other things or instruments incident to the carrying out of the intent of these resolutions."

42 The meeting then adjourned until eleven o'clock A. M., Friday, July 11th, 1913.

——— ———,
*Vice-President.*

——— ———,
*Secretary.*

(*Certified Copy of Bill of Complaint in the case of United States of America v. Pierce Oil Corporation, filed February 4, 1916, in the U. S. District Court, Northern District of Louisiana.*)

In the District Court of the United States for the Western District of Louisiana.

No. 1080. In Equity.

UNITED STATES OF AMERICA, Plaintiff,

vs.

PIERCE OIL CORPORATION, Defendant.

To the Honorable Aleck Boarman, Judge of the District Court of the United States in and for the Western District of Louisiana:

The United States of America brings this its bill against the Pierce Oil Corporation, a corporation organied under the laws of Virginia and a citizen of that State, having its domicile in the City of Richmond, said corporation doing business in the State of Louisiana and

having its Louisiana domicile in the City of Shreveport, in the Western District of Louisiana. And for its cause of action, plaintiff states:

That on the 29th day of January, 1907, the grand jury at a term of this Honorable Court held at Alexandria, Louisiana, returned a bill of indictment against the Water-Pierce Oil Company, a corporation organized under the laws of Missouri and domiciled in the City of Saint Louis, said State, in which it was charged that said Waters-Pierce Oil Company had shipped from Bixby, Illinois, to various points in Louisiana on the Southern Pacific Railroad, fourteen tank cars of oil, at a rate less than the established and legal through rate, as will fully appear by reference to said indictment, No. 1626 on the docket of this Court, a copy of which is hereto attached and made a part hereof.

That on the trial of said case there was a verdict of guilty, and the Court imposed a fine of Fourteen Thousand Dollars ($14,000) and costs, amounting to Fourteen Hundred, Seventy-four and 44/100 Dollars ($1474.44), aggregating a total of Fifteen Thousand, Four Hundred, Seventy-four and 44/100 Dollars ($15,474.44), for which amount judgment was rendered and
43 signed on March 20, 1914, all of which will fully appear by reference to the judgment in said case No. 1629 on the docket of this court, entitled United States of America versus Water-Pierce Oil Company a copy of which is hereto attached and made part hereof.

Plaintiff states that said judgment was rendered in the City of Shreveport, Parish of Caddo, State of Louisiana, and was duly docketed and recorded in the office of the Clerk of the United States District Court in the said city and parish, where the said Clerk has a permanent office and a judgment record open at all times for public inspection.

Plaintiff shows that the said defendant, Waters Pierce Oil Company, obtained a writ of error from said judgment, without supersedeas, to the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, and that on due hearing had the judgment of the lower court was affirmed.

Plaintiff shows that execution has issued on said judgment, and been returned nulla bona. That said Waters-Pierce Oil Company has no property within the jurisdiction of this Court.

Plaintiff shows that in July, 1913, the Waters-Pierce Oil Company transferred to the Pierce Oil Corporation all of its property, both real and personal, and its business as a going concern.

Plaintiff shows that on June 21, 1913, the Pierce Oil Corporation was organized under the laws of Virginia, almost, if not entirely, by the stockholders of the Waters-Pierce Oil Company, for the purpose of absorbing and taking over and succeeding to the assets, property and business of said Waters-Pierce Oil Company. That the capital stock of said corporation, authorized by its charter, is Twenty-one Million Dollars ($21,000,000), one half of which is common stock and the other half preferred stock.

Plaintiff shows that on July 9, 1913, at a meeting of the Board

of Directors of the Waters-Pierce Oil Company, it was stated by the Vice-President "that the Pierce Oil Corporation had been formed under the laws of the State of Virginia, and was prepared to take over all of the property and assets of the Waters-Pierce Oil Company, giving to it $10,500,000 in par value of the capital stock of the Pierce Oil Corporation and $5,000,000 in cash and assuming all of its debts, liabilities and obligations," whereupon a reso-
44 lution was adopted accepting the proposition of the Pierce Oil Corporation to transfer all of the assets and property, real, personal and mixed, of the Waters-Pierce Oil Company to it "as a going concern," in consideration of the price offered and the assumption by the purchaser of the payment of all debts, obligations and liabilities of the Waters-Pierce Oil Company, and the president, Clay Arthur Pierce, the vice-president, and Thomas F. Lydon, secretary, were by the resolution authorized to execute and deliver all deeds and conveyances necessary to carry out the intent of the resolution.

Plaintiff shows that on July 10, 1913, at a meeting of the Board of Directors of the Pierce Oil Corporation, a resolution was adopted authorizing the purchase by the officers of the company of all of the assets and property, real personal and mixed, of the Waters-Pierce Oil Company, for the sum and price of $10,500,000 in the common capital stock of the corporation and $5,000,000 in cash, and the assumption, on the part of the purchaser, of the payment of all debts, obligations and liabilities of the Waters-Pierce Oil Company, said stock and cash to be delivered to Clay Arthur Pierce and Henry S. Priest, residents of Saint Louis, Missouri, agents and trustees of the Waters-Pierce Oil Company, all of which will fully appear from copy of the minutes of the said meeting of the Board of Directors of the Pierce Oil Corporation of July 10, 1913, hereto attached and made part hereof.

Plaintiff shows that in accordance with said resolutions of said respective companies, the Waters-Pierce Oil Company, through its president, Clay Arthur Pierce, and its secretary, T. F. Lydon, executed to the Pierce Oil Corporation, represented by Clay Arthur Pierce, its president, and T. F. Lydon, its secretary, a conveyance of all of its assets and property, real personal, and mixed, as of date July 7, 1913, for the stated consideration of "one dollar, lawful money of the United States, and other valuable considerations, to it in hand paid," the other valuable considerations having been the payment of $10,500,000 in capital stock of the Pierce Oil Corporation and $5,000,000 in cash and the assumption of the payment of all the debts, liabilities and obligations of the Waters-Pierce Oil Company. That in said contract it was agreed that the officers of the Waters-Pierce Oil Company should thereafter make deeds to the real estate owned by said company in various states, in accordance with the laws of those states, all of which will appear by reference to copy of said agreement hereto attached and made part
45 hereof.

Plaintiff shows that in accordance with said agreement, the Waters-Pierce Oil Company has made formal deeds to the Pierce Oil

Corporation of all of its real estate in the State of Louisiana, as follows, to wit:

The following described property, situated in the Parish of Acadia, State of Louisiana: Lot One (1) in Block Eighty-eight (88), situated in the E. L. C. Addition to the Town of Rayne, said block bounded as follows: on the north by A Street, on the South by Lessley Street, on the east by Bradford Avenue, and on the West by McCown Avenue; said lot having a frontage of forty (40) feet on Bradford Avenue and running back between parallel lines a depth of One hundred and twenty (120) feet, as per plat on file in the Clerk's office in Crowley, Louisiana, transferred to the Pierce Oil Corporation by Waters-Pierce Oil Company as per deed recorded at pages 349 and 350, Book V-2, Conveyance Record of the Parish of Acadia, Louisiana.

The following described property, situated in the Parish of Caddo, State of Louisiana; A certain lot or parcel of land situated in the City of Shreveport, and described as follows: Commencing at the southeast corner of Lot Ten (10) of Section One (1), Township Seventeen (17), Range Fourteen (14), which is the center of Southern Avenue of the City of Shreveport, run thence west thirty feet to a stake in the Western Line of Southern Avenue for a starting point, thence run west two hundred thirty (230) feet to an iron pipe in the right of way of the Kansas City, Shreveport & Gulf Railway Company, thence North along said right of way of said Railway Company two hundred twenty and 4/100 (220.04) feet to a stake on the said right of way of said Railway Company, thence East two hundred and thirty (230) feet to a stake in the west line of Southern Avenue two hundred and twenty and 4/100 feet to the place of beginning, including in this sale all the right, title and interest of the vendor in that parcel of land lying between the Independent Ice and Cold Storage property and the H. & S. Ry. Company's lands, whether particularly described herein or not, with all buildings and improvements thereon, excepting a large red warehouse which the former vendor agreed to move within forty five days; all of above lands situated in Township 17, North of Range 14 West, in said Parish and State, transferred to the Pierce Oil Corporation by Waters-Pierce Oil Company as per deed recorded at page 89, Conveyance Book 89, Records of the Parish of Caddo, Louisiana.

46 The following described property, situated in the Parish of Calcasieu, State of Louisiana; A certain lot or parcel of land, situated within the City of Lake Charles, having one hundred forty-five (145) feet front on Lake Charles and running back three hundred fifty (350) feet in an easterly direction between parallel lines to Pithon Alley or Street (said 350 feet not including Front Street), and having the same front on Pithon Street of One Hundred Forty-five (145) feet as on the Lake Front; bounded on the north by lots of the Estate of Abel West and of Dr. Louis I. Esparjillier, on the East by Pithon Street, South by Gill Street, and West by Lake Charles, including all riparian rights thereto in any wise belonging, together with all improvements and appurtenances thereunto belonging, transferred to the Pierce Oil Corporation, by Waters-

Pierce Oil Company as per deed recorded at page 342, Book 142, Conveyance Records, of the Parish of Calcasieu, Louisiana.

The following described property, situated in the Parish of Iberia, Louisiana: containing and measuring one hundred and five (105) feet front on Morgan's La. & Texas Railroad; thence Two Hundred and six (206) feet on the right of way of the Jeanerette Lumber & Shingle Co., a railroad switch—; thence Ten (10) feet on a street to property formerly owned by Zenon Johnson; thence on line of property formerly of said Johnson parallel with said switch of the Jeanerette Lumber & Shingle Co., sixty-five (65) feet; and from thence on line of property now or formerly of said Johnson One Hundred Fifteen (115) feet to said Morgan's Louisiana & Texas Railroad, the point of beginning said property being bounded as follows: On the north by said street on which the ten feet run; on the south by said Morgan's Louisiana & Texas Railroad; on the east by said switch of the Jeanerette Lumber & Shingle Co., and on the west by said property formerly belonging to said Johnson being a part of that same property acquired by said Johnson from Henry Hebert in January, 1900, and by the said Henry Hebert from Jos. R. Bress, transferred to the Pierce Oil Corporation by Waters-Pierce Oil Company as per deed recorded at page 587, Book 77, Conveyance Records of the Parish of Iberia.

Also the following described property, situated in the Parish of Iberia, Louisiana, to-wit: A certain tract of land with all the buildings and improvements thereon and all the materials thereon with all the rights and privileges thereto attached, situated in the
47 City of New Iberia, Parish and State aforesaid, in the northwest portion of said city, having a front on Jefferson Street of One Hundred Feet along said street by a depth between parallel lines of Four Hundred and Ten feet, extending to the Railroad Avenue, bounded on the northwest by said Railroad Avenue, on the southeast by said Jefferson Street and on the northeast by Frere Street on the southeast by property now or formerly belonging to the vendors of Waters-Pierce Oil Company, transferred to the Pierce Oil Corporation by Waters-Pierce Oil Company as per deed recorded at page 589, Book 77, Conveyance Records of the Parish of Iberia, Louisiana.

The following described property, situated in the Parish of Lincoln, Louisiana: All that part of Lot four (4) in square thirty-one (31) according to the original plat of said town of Ruston on file and of record in Clerk's Office of Lincoln Parish, Louisiana, east [*or*] right of way of Ark. Southern Railroad, being the same property acquired by Waters-Pierce Oil Company by deed recorded in Conveyance Book T, Folio 524, transferred from Waters-Pierce Oil Company to Pierce Oil Corporation by deed recorded at pages 191 and 192, Book Z, Conveyance Records of the Parish of Lincoln, Louisiana.

The following described property, situated in the Parish of Ouachita, Louisiana: A certain triangular lot of ground situated in Delaney's First Addition to Monroe, in said City of Monroe, said Parish of Ouachita, fronting one hundred and seventy feet on Twelfth

Street; one hundred and ninety feet on Oak Street and two hundred and fifty-five feet on the Vicksburg, Shreveport & Pacific Railroad right of way, together with all the improvements and appurtenances thereunto belonging, transferred to Pierce Oil Corporation by Waters-Pierce Oil Company as per deed recorded at page 145, Conveyance Book 70, Records of the Parish of Ouachita, Louisiana.

The following described property, situated in the Parish of Rapides, Louisiana: A certain parcel of land in Cheneyville, Louisiana, being a portion of the Roberts Place acquired by Geo. W. Bennett from the New Orleans Canal & Banking Co. on the ninth day of March, 1887 by an act passed before Theodore Guyot, Notary Public in the City of New Orleans, Parish of Orleans, Louisiana, situated on the left descending bank of Bayou Bomf, containing one acre and eighteen hundredths of an acre of ground, bounded on the north by the Texas & Pacific Railway, south by lands now, or formerly owned by Laura Smith and west by lands formerly owned
48 by Geo. W. Bennett, transferred to Pierce Oil Corporation by Waters-Pierce Oil Company as per deed recorded at page 517, Book 64, Conveyance Records of the Parish of Rapides, Louisiana.

Also the following described property, situated in the Parish of Rapides, Louisiana: A certain tract or parcel of land of irregular shape, situated, lying and being in the City of Alexandria, State of Louisiana, and being a part of Block Six of the Wyano Land Company's Addition to said City of Alexandria, as numerically designated upon the official map of said Wyano Land Company's addition of record in the office of the recorder of said parish of Rapides, and as shown and designated upon the official map of said City of Alexandria by Ira W. Sylvester, C. E., the part and portion of said block herein conveyed being more particularly described as follows, to-wit: "Start at the intersection of Lee & Thorn Streets where said block narrows to a point and run along said Thorn Street a distance of two hundred and seventy-four feet, thence in a line parallel to said Lee Street a distance of ninety-eight (98) feet to the right of way of the Texas & Pacific Railway Company, thence along said right of way of the Texas & Pacific Railway Company, back to Lee Street, or the point of beginning," transferred by the Waters-Pierce Oil Company to Pierce Oil Corporation as per deed recorded at page 518, Book 64, Conveyance Records of the Parish of Rapides, Louisiana.

The following described property, situated in the Parish of Saint Landry, Louisiana: A certain parcel of land, more fully described as being Lot No. Thirteen (13) in Block Number Eighty-nine (89), bounded on the north by Lot No. Eleven (11) on the south by Lot No. Fourteen (14), East by C. S. N. O. & P. Ry. on the west by branch of L. W. R. R., measuring Fifty (50) feet, front on last named railroad by a depth of One Hundred (100) feet, as per original and official plat of survey of said town of Eunice, Louisiana. Being the same property acquired by the Waters Pierce Oil Company and recorded in the Parish of St. Landry, in Conveyance Book C, No. 4¼, folio —; transferred to Pierce Oil Corporation by Waters-

Pierce Oil Company as per deed recorded in Conveyance Book R-4, at page 564, records of the Parish of Saint Landry, Louisiana.

Also the following described property, situated, in the Parish of Saint Landry, Louisiana: A certain lot of ground within the limits of the town of Opelousas, fronting on Vine Street, said frontage being fifty feet and runs back south between parallel lines a distance of one hundred thirty-five feet; bounded on the north by
49 Vine Street, on the east, west and south by property now, or formerly of one Eleanor B. Comeau, being the same lot or parcel of property conveyed to said Waters Pierce Oil Company by said Eleanor B. Comeau, and her husband C. H. Comeau, by deed or act dated 12th day of June, 1907, together with all the rights, [privileges] and appurtenances thereunto belonging and which are mentioned in and described in said deed to said Waters-Pierce Oil Company from said Eleanor B. Comeau and C. H. Comeau, being the same property acquired by the Waters-Pierce Oil Company and recorded in the Parish of Saint Landry, in conveyance Book J-4, folio 604, transferred to Pierce Oil Corporation by Waters-Pierce Oil Company as per deed recorded in Conveyance Book R-4, at page 563, records of the Parish of St. Landry, Louisiana.

The following described property, situated in the Parish of Saint Martin, Louisiana, to-wit: First: A certain piece or portion of ground forming the corner of Lewis Street and Railroad track, situated in the Town of St. Martinville, State and Parish aforesaid, and measuring thirty (30) feet front on Lewis Street, by a depth running to a street separating said portion of ground from the property of Mrs. Widow Henry Blue; said piece of ground being bounded on the North by the railroad track, on the south by the property of Feliz Bienvenu, on the East by Lewis Street, and on the West by a street separating it from the property of Mrs. Henry Bleu; said portion of ground forming a part of a larger tract of ground situated in the said town, bounded on the North by a street separating it from the property of Mrs. Alex. Bienvenu, now the railroad track, south by lot formerly belonging to M. Bienvenu, now the property of R. J. Bienvenu, East by a street separating it from the Protestant Church called Lewis Street, and west by a street separating it from the property of Mrs. Henry Blue; it being the same property which was acquired by the old Waters Pierce Oil Company, by act of sale before W. A. Bienvenu, Notary Public, on the 4th day of December, 1895, which is recorded in the recorder's office in and for said Parish, in registrar of conveyances No. 49. Second: A certain piece or parcel of ground situated in the town of St. Martinville, Parish of St. Martin, State aforesaid, to be taken at a distance of thirty feet from the corner of Lewis Street and the railroad track, and measuring ten feet front on Lewis Street by a depth measuring to a street separating it from the property of Mrs. Henry Bleu; said piece or parcel of ground being bounded on the north by lot belonging to Waters-Pierce
50 Oil Company, on the South by property belonging to Feliz Bienvenu, on the east by Lewis street, and on the west by street separating it from the property of Mrs. Henry Blue; being the same property acquired by the Waters Pierce Oil Company from

Feliz Bienvenu, on March 16th, 1896, which act is recorded in the recorder's office in and for the Parish of St. Martin, in Register of Conveyances No. 49; transferred to Pierce Oil Corporation from Waters-Pierce Oil Company by deed recorded at page 345, Book 75, Conveyance Records of the Parish of Saint Martin.

The following described property, situated in the Parish of Saint Mary, State of Louisiana: The undivided one-half of that certain tract of ground lying and being situated in the town of Franklin, Parish of St. Mary, and designated as Lot Number Fourteen of map of land of E. J. Smith made by W. W. Johnson, Surveyor, June 16, 1888, having a front of seventy-two feet on the south side of Willow street, running between parallel lines until it intersects the property of Morgan La. & Texas Railroad & Steamship Company, bounded north by said Willow street, east of property now or formerly belonging to the estate of Jake Florenzie and south and west by Morgan La. & Texas Railroad & Steamship Co., with and including the building and improvements thereon situated, and thereto belonging; transferred by Waters-Pierce Oil Company to Pierce Oil Corporation as per deed recorded at page 41, Book 3-I, Conveyance Records of the Parish of Saint Mary, Louisiana.

All of which will fully appear by certified copies of deeds of real estate hereto attached and made part hereof. That all of said real estate above described is in the Western District of Louisiana, within the jurisdiction of this Court, and that plaintiff has the right to follow said real estate, so sold by its debtor the Waters-Pierce Oil Company, into the hands of the purchaser, Pierce Oil Corporation, and to have such judgment ordered and decreed to operate as a lien and judicial mortgage on said property and to have such judgment enforced against the same.

Plaintiff shows that the capital stock of the Waters-Pierce Oil Company was a trust fund for the payment of all of its creditors, and that the sale and transfer by it of all of its property to the Pierce Oil Corporation was fraudulent as against the rights of complainant, to the knowledge of the Pierce Oil Corporation, whose president and secretary were likewise president and secretary of the Waters-
51 Pierce Oil Company, and whose directors and stockholders, with slight exceptions, were the same as those of the Waters-Pierce Oil Company. That the said purchase by the Pierce Oil Corporation of all of the property and assets of the Waters-Pierce Oil Company was not a bona fide purchase in good faith and that said [*said*] sale and transfer of said property was made subject to the rights of all persons who had claims, debts or demands against said Waters-Pierce Oil Company, and subject to the liability of said Waters-Pierce Oil Company to complainant, and subject to whatever sentence might be imposed and judgment rendered on same against said Waters-Pierce Oil Company in the prosecution then pending in this Court.

Plaintiff shows that said transfer to the Pierce Oil Corporation was of all of its assets whatsoever and left it, the said Waters-Pierce Oil Company, without any means or power to meet its outstanding obligations, including that due your complainant; that said Waters-

Pierce Oil Company ceased to do business on said transfer of all of its property and is no longer a going concern.

That defendant, Pierce Oil Corporation, by absorbing the Waters-Pierce Oil Company and taking over all of its assets, property and business as a going concern, and by its express assumpsit of the payment of all debts, liabilities and obligations of the Waters-Pierce Oil Company, has made itself responsible for *and* obtained by complainant against said Waters-Pierce Oil Company.

Wherefore, plaintiff prays for process against the said Pierce Oil Corporation, through Charles D. Dickson, a resident of the Parish of Caddo, State of Louisiana, its agent in the State of Louisiana for the purpose of service of process, and that said Pierce Oil Corporation be cited to appear before this Honorable Court and answer this bill; and that on due hearing had this Court decree payment by said Pierce Oil Corporation of the aforesaid judgment of Fourteen Thousand Dollars ($14,000) and costs of One Thousand, Four Hundred, Seventy-four and 44/100 Dollars ($1,474.44), aggregating a total of Fifteen Thousand, Four Hundred, Seventy-four and 44/100 Dollars ($15,474.44); and that said judgment be made executory against the said Pierce Oil Corporation, and that plaintiff be decreed to have a lien and judicial mortgage upon the property in Louisiana, above described, sold and transferred by said Waters-Pierce Oil Company to said Pierce Oil Corporation in fraud of plaintiff's
52 rights, and that said property be ordered seized and sold to pay and satisfy said judgment and costs.

Plaintiff prays for all further orders necessary or needful, and for costs and general relief.

T. W. GREGORY,
*Attorney General of the United States.*
GEO. WHITFIELD JACK,
*United States Attorney.*
ROBERT A. HUNTER,
*Assistant United States Attorney.*

Endorsed: "No. 1080. In Equity. United States District Court, Western District of Louisiana. United States vs. Pierce Oil Corporation. Bill of Complaint. Filed Feb. 4, 1916, Leroy B. Gulotta, Clerk. U. S. District Court, West. Dist. of Louisiana.

United States District Court, Western District of Louisiana.

Clerk's Office.

I, W. B. Lee, Clerk of the United States District Court for the Western District of Louisiana, do hereby certify that the foregoing thirteen pages numbered from 1 to 13 inclusive, contain a true, full and correct copy of Bill of Complaint (Exhibits attached to Original Bill of Complaint not included herein), in a cause entit-ed United States of America vs. Pierce Oil Corporation. In Equity. No. 1080 on the docket of said Court, as the original of same appears on file in this office.

Witness my hand and seal at office, at the City of Shreveport, Louisiana, on this the 9th day of January, A. D. 1918.

[SEAL.] W. B. LEE,
*Clerk United States District Court for the Western District of Louisiana.*

53 (*Certified Copy of Answer in the Case of United States of America vs. Pierce Oil Corporation, Filed March 6, 1916, in the U. S. District Court, Northern District of Louisiana.*)

Now this day comes the Pierce Oil Corporation, Defendant in the above entitled cause, and for its Answer to the Bill in Chancery of Plaintiff therein, admits that it is a corporation organized under the laws of Virginia, having its domicile in the City of Richmond, in said State, and is doing business in the State of Louisiana, having its chief place of business therein in the City of Shreveport in the Western District of Louisiana.

And for further answer to plaintiff's bill, the defendant admits that on the 29th day of January, 1907, the Grand Jury, at a term of this Honorable Court held at Alexandria, Louisiana, returned an indictment against the Waters-Pierce Oil Company, a corporation organized under the laws of Missouri; that on the trial of said cause, there was a verdict of guilty and the Court imposed a fine of $14,000.00 and costs, for which amount Judgment was rendered and signed on March 20, 1914; admits that said judgment was rendered and signed on March 20, 1914; admits that said judgment was rendered at the City of Shreveport, Parish of Caddo, State of Louisiana, and was duly docketed and recorded in the office of the Clerk of this Court in said City and Parish; admits that the said defendant, Waters-Pierce Oil Company, obtained a Writ of Error from said judgment without supersedeas to the United States Circuit Court of Appeals for the Fifth Circuit of Louisiana and on due hearing the judgment of the lower court was affirmed, all as in said bill alleged; but defendant denies that the costs of said District Court in said Suit amounted to $1474.44 as in said bill alleged.

And answering further, the defendant admits that in July, 1913, the Waters-Pierce Oil Company [*transffered*] to the Pierce Oil Corporation all of its property both real and personal and its business as a going concern; admits that on June 21, 1913, the Pierce Oil Corporation was organized under the laws of Virginia with an authorized capital of $21,000,000.00, one-half of which is common stock and the other half preferred stock, but denies that said corporation was organized almost or entirely by the stockholders of the Waters-Pierce Oil Company for the purpose of absorbing and taking over and succeeding to the assets, property and business of the said Waters-Pierce Oil Company, as in the bill alleged.

54 Defendant further admits that on July 9, 1913, at a meeting of the Board of Directors of the Waters-Pierce Oil Company, it was stated by the Vice-President that the Pierce Oil Corporation had been formed under the laws of the State of Virginia

and was prepared to take over all the property and assets of the Waters-Pierce Oil Company, giving to it $10,500,000.00 in par value of the capital stock of the Pierce Oil Corporation, $5,000,000.00 in cash and assuming all of its debts, liabilities and obligations, and that thereupon a resolution was adopted accepting the proposition of the Pierce Oil Corporation for the transfer of the assets and property, real, personal, and mixed of the Waters-Pierce Oil Company, but defendant denies that said resolution was of the tenor and effect as stated in plaintiff's bill and defendant avers that said resolutions adopted, as aforesaid, were in words and figures as follows:

"Resolved, that all of the real, personal and mixed property, and chattels real, corporeal and incorporeal of this corporation, including all of its lands, tenements, and hereditaments, of whatsoever name and nature, leases, mining claims denouncements, prospects for oil and other mineral, easements, profits, covenents, warranties, licenses, permits, rights and choses in action in respect of real property and chattels real, and each and every other right, title or interest which it may now have or hereafter acquire in respect of real property, corporeal or incorporeal, and all chattels real, wherever situated, together with all fixtures and articles of personal property used on or in connection with its said real property and chattels real, and all of its chattels, goods, merchandises, machinery, tools, mortgages, credits, patents, trade-marks, copyrights, tools, mortgages, credits, patents, trade names, good-will, rights and choses in action, and all and singular its other personal and mixed property, corporeal and incorporeal, of every kind, which this corporation now has or hereafter may acquire, the whole to be transferred as a going concern, in return for $10,500,000 of the common capital stock of the said Pierce Oil Corporation, $5,000,000 in cash in lawful money of the United States, and the assumption by said Pierce Oil Corporation of all of the debts, obligations and — of this corporation;

"Resolved, that Clay Arthur Pierce, President; Andrew M. Finley, Vice President; Thomas F. Lydon, Secretary, and the other officers of this corporation be, and they hereby are respectively authorized and directed to do all and all manner of things, and to make, execute and deliver all and all manner of deeds, conveyances and other instruments as may be necessary, desirable or
55 convenient to carry out the intent of these resolutions;

"Resolved, that Clay Arthur Pierce and Henry S. Priest be appointed agents and trustees of this corporation to receive for it the said $10,500,000 par value of the shares of the common capital stock of the Pierce Oil Corporation, the said $5,000,000 in cash, and any and all other things or instruments incident to the carrying out of the intent of these resolutions."

Defendant also admits that on July 10, 1913, at a meeting of the Board of Directors of the Pierce Oil Corporation, a resolution was adopted authorizing the purchase by the officers of the company of all of the assets and property, real, personal, and mixed of the

Waters-Pierce Oil Company; admits that in accordance with said resolution, the Waters-Pierce Oil Company conveyed all of its assets and property, real, personal and mixed, and that said Company has made formal deeds to the Pierce Oil Corporation of all of its real estate in the State of Louisiana, all as averred and described in plaintiff's bill; but, defendant denies that plaintiff has the right to follow said real estate so sold by the Waters-Pierce Oil Company into the hands of the defendant and to have such judgment against the Pierce Oil Corporation ordered and decreed to operate as a lien and judicial mortgage on said property and enforced against the same,—as in plaintiff's bill alleged.

Answering further, defendant admits that the capital stock of the Waters-Pierce Oil Company was a trust fund for the payment of its creditors, but denies that the plaintiff was, or is, a creditor of said Waters-Pierce Oil Company with respect to the verdict and judgment sued on in this cause, and denies that the sale and transfer by said Waters-Pierce Oil Company of all of its property to the Pierce Oil Corporation was fraudulent as against the rights of complainant; denies that said purchase by the defendant of all the property and assets of the Waters-Pierce Oil Company was not a bona fide purchase in good faith; denies that said sale and transfer of said property was made subject to the liability of said Waters-Pierce Oil Company to complainant and subject to whatever sentence might be imposed and judgment rendered against said Waters-Pierce Oil Company in the prosecution then pending against said Waters-Pierce Oil Company,—all as in the bill averred.

Answering further, defendant admits that said Waters-Pierce Oil Company ceased to do business on transfer of all of its prop-
56 erty and is no longer a going concern; but defendant denies that the transfer of its assets left it without any means or power to meet its outstanding obligations or the [alleged] obligation due to complainant; denies that defendant by taking over the assets, property and business and by assuming the payment of all of its debts, liabilities, and obligations, this defendant has made itself responsible for the judgment obtained by complainant against said Waters-Pierce Oil Company.

And for its further answer and defense, defendant states that the sale by said Waters-Pierce Oil Company of all of its property and assets to this defendant was made in good faith and for a valuable consideration; that said sale and conveyance of said property and assets was made and consummated and the full consideration therefor was paid by this defendant on or about the seventh day of July, 1913, that thereafter, to-wit: on or about the 20th day of March, 1914, the trial under said indictment was had and verdict and judgment rendered against said Waters-Pierce Oil Company; that said indictment was for the alleged commission of a crime or misdemeanor by said Waters-Pierce Oil Company in contravention of the laws of the United States, and that the said judgment rendered thereunder was for the fine or penalty imposed by the said laws of the United States for said Crime or misdemeanor and did not then and there or at the time of the sale and conveyance of said property and assets of the Waters-Pierce Oil Company to this defendant, con-

stitute a debt, liability or obligation against said Waters-Pierce Oil Company or against this defendant, and that this defendant never agreed to pay, or assumed to pay, the fine or penalty which was adjudged against said Waters-Pierce Oil Company, as aforesaid.

Wherefore, having fully answered, defendant prays for judgment.

J. D. JOHNSON,
J. D. WILKINSON,
*Solicitors for Defendant.*

Endorsed: No. 1080. In Equity. In the District Court of the United States for the Western District of Louisiana. United States of America, Plaintiff vs. Pierce Oil Corporation, Defendant. Answer. Filed Mar. 6-1916 Leroy B. Gulotta, Clerk, U. S. District Court, West. Dist. of Louisiana.

57 United States District Court, Western District of Louisiana.

Clerk's Office.

I, W. B. Lee, Clerk of the United States District Court for the Western District of Louisiana, do hereby certify that the foregoing four pages numbered from 1 to 4 inclusive, contain a true full and correct copy of Answer in a cause entitled United States of America vs. Pierce Oil Corporation, In Equity, No. 1080 on the docket of said Court, as the original of same appears on file in this office.

Witness my hand and seal *at* office, at the City of Shreveport, Louisiana, on this the 9th day of January, A. D., 1918.

[SEAL.]

W. B. LEE,
*Clerk United States District Court for the Western District of Louisiana.*

*Affidavit of Clay A. Pierce as to Shares of Stock, etc., of Pierce Oil Corporation.*

STATE OF NEW YORK,
*County of New York,* ss:

Clay Arthur Pierce, being duly sworn, deposes and says, as follows:

That on or before July 29th, 1913, this deponent and Henry S. Priest, as Liquidating Agents and Trustees of Waters Pierce Oil Company, delivered all of the cash and shares of stock of Pierce Oil Corporation remaining in their hands after the distribution, described in the agreed stipulation of facts and agreement of counsel herein, to Guaranty Trust Company of New York, which was created by mutual agreement of all parties concerned the agent and trustee to distribute said cash and stock among the then holders of approximately two hundred and sixty-nine (269) shares of stock of Waters Pierce Oil Company; that on or about the said date of July 29th, 1913, this deponent and said Henry S. Priest, as Liqui-

dating Agents and Trustees of Waters Pierce Oil Company, mailed a circular to said stockholders of Waters Pierce Oil Company, dated as of July 25th, 1913, advising that upon surrender to Guaranty Trust Company of New York, 140 Broadway, New York City,
58 N. Y., of their certificates of Waters Pierce Oil Company properly endorsed each would receive his share of said cash and stock of Pierce Oil Corporation; this deponent is advised and believes that thereupon the Guaranty Trust Company proceeded to distribute and did distribute among said stockholders of Waters Pierce Oil Company the said cash and stock of Pierce Oil Corporation, delivered to them on July 29th, 1913, as hereinbefore set forth: that since said date of July 29th, 1913, this deponent and the said Henry S. Priest, as Liquidating Agents and Trustees of Waters Pierce Oil Company, have not had in their hands or in their custody or control any of the money or stock originally placed in their hands as such Liquidating Agents and Trustees.

CLAY ARTHUR PIERCE.

Sworn to before me this 18th day of February, 1917.

[SEAL.] JESSE MYERS,
*Notary Public N. Y. Co. No.* 339.

Endorsed: "Filed Mar. 9, 1918, W. W. Nall, Clerk."

(*Decree of the District Court, March* 11, 1918.)

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

No. 4538. In Equity.

UNITED STATES OF AMERICA, Complainant,

vs.

WATERS PIERCE OIL COMPANY, a Corporation; HENRY S. PRIEST, CLAY ARTHUR PIERCE, HENRY CLAY PIERCE, and PIERCE INVESTMENT TRUST COMPANY, a Corporation, Defendants.

This cause having come on to be heard at the present term of this Court, and having been submitted to the Court, by stipulation of counsel, upon the pleadings and upon the agreed statement of facts filed herein; the Court being now fully advised in the premises doth find the facts in conformity with said agreed statement, and doth find the issues herein joined in favor of said complainant and against the defendants Henry Clay Pierce, Pierce Investment Trust Company and Clay Arthur Pierce (as an individual), and against said complainant and in favor of defendants Waters Pierce Oil Company, a corporation, Henry S. Priest and Clay Arthur Pierce as agents and trustees of said Waters Pierce Oil Company; wherefore the Court doth Order, Adjudge and Decree, as follows:

1. That the judgment obtained by the United States of America in the United States District Court for the Western District
59 of Louisiana, at Alexandria, Louisiana, on January 29th, 1907, in the principal sum of $14,000.00 is a valid and subsisting judgment against the Waters Pierce Oil Company, a corporation; and that said defendant has divested itself of all its property and has no assets subject to execution under said judgment.

2. That under the terms of the sale of the property of said Waters Pierce Oil Company, a corporation, the following named parties received, as the proceeds in whole or in part of their respective holdings of stock in said corporation, the amounts of money set opposite their respective names, to wit:

| Name. | Amount. |
|---|---|
| Henry Clay Pierce | $3,408,750.00 |
| Pierce Investment Trust Company | 1,250,000.00 |
| Clay Arthur Pierce | 1,250.00 |

which amounts are, in equity, subjected to the payment of the aforesaid judgment obtained by the United States of America.

3. That the defendant Waters Pierce Oil Company, a corporation, having divested itself of all its property, and that the defendants Henry S. Priest and Clay Arthur Pierce, (as trustees &c.) having divested themselves of the money, stock, property and effects received by them as Trustees and Agents of the said Waters-Pierce Oil Company, a corporation, by disbursing the same to the holders of stock in said Waters-Pierce Oil Company, a corporation, as beneficiaries—are dismissed from the cause, without day.

4. That the complainant have and recover of the defendants Henry Clay Pierce, Pierce Investment Trust Company, a corporation, and Clay Arthur Pierce (as an individual), in satisfaction of the judgment obtained as aforesaid in the Western District of Louisiana, the sum of Fourteen Thousand Dollars, with interest at 6% thereon from January 29th, 1907, save that as against the defendant Clay Arthur Pierce (as an individual) this judgment is limited to the amount of money so received by him as stockholder-beneficiary aforesaid, namely, Twelve Hundred Fifty Dollars; and that complainant recover of said three named defendants its costs and charges herein expended, for all of which let execution issue as at law.

March 11th, 1918.
(Signed) DAVID P. DYER,
*Judge.*

Endorsed: "Filed Mar. 11, 1918, W. W. Nall, Clerk."

60 *(Petition for and Order Allowing Appeal.)*

To the Honorable David P. Dyer, District Judge:

The above named Clay Arthur Pierce, Henry Clay Pierce and Pierce Investment Trust Company, Defendants, being aggrieved by the decree and order rendered and entered in the above entitled cause on the 11th day of March, A. D. 1918, do hereby appeal from said decree and order to the Circuit Court of Appeals for the Eighth Circuit for the reasons set forth in the Assignment of Errors, filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings, and documents upon which said decree and order was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Eighth Circuit, under the rules of said Court in such cases made and provided.

And Your petitioners further pray that the proper order relating to the required security to be required of them be made.

CLAY ARTHUR PIERCE,
By BOYLE & PRIEST,
*His Attorney.*
HENRY CLAY PIERCE &
PIERCE INVESTMENT TRUST CO.,
By FORDYCE, HOLLIDAY & WHITE,
*Their Attorney-.*

Appeal allowed upon giving bond as required by law in the sum of $500. but not to act as supersedeas.

(Signed) DAVID P. DYER,
*Judge.*

Endorsed: "Filed Mar. 22, 1918, W. W. Nall, Clerk."

*(Record Entry of the Filing of Assignment of Errors, Petition for Appeal, etc.)*

Now at this day come the defendants, Clay Arthur Pierce, Henry Clay Pierce, and the Pierce Investment Trust Company, a corporation, and file their joint assignment of errors, their petition for an appeal in this cause to the United States Circuit Court of Appeals for the Eighth Circuit, and a stipulation of parties waiving the issuance of a citation herein.

(March 22nd, 1918, David P. Dyer, Judge.)

61 *Assignment of Errors.*

Now come, Clay Arthur Pierce, Henry Clay Pierce, and Pierce Investment Trust Company, Defendants in the above entitled cause and file the following assignment of errors upon which they will

rely upon their prosecution of the appeal in the above entitled cause, from the decree made by this Honorable Court on the eleventh day of March, 1918.

1. That the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri erred in refusing to dismiss the first amended bill, of plaintiff and in overruling defendants' separate motions to dismiss said case.

2. That the first amended bill in said case does not set out a cause of action or ground for recovery in equity against said defendants or either of them.

3. That said amended bill sets forth separate and distinct claims of different characters against the various defendants therein and is otherwise multifarious.

4. That there is [misjoin-er] of parties defendant in said amended bill and cause, in that the claim or alleged causes of action do not affect all of the defendants alike or in the same capacity.

5. That there is a [misjoin-er] of claims or alleged causes of action in said amended bill and cause in that the causes of action against the various defendants are of different nature and which are not cognizable in equity in the same action.

6. That it appears from the averments of said amended bill and stipulation of facts that defendants' liability or cause of action is asserted against the different defendants therein, in this: that judgment is sought against the defendants Henry S. Priest and Clay Arthur Pierce for property and money of Waters-Pierce Oil Company, alleged to be in their hands as liquidated agents of said company, while the judgment sought and obtained against the defendants Henry Clay Pierce, Pierce Investment Trust Company and Clay Arthur Pierce, individually as and for moneys of Waters-Pierce Oil Company alleged to have been paid to them respectively in liquidation and redemption of shares of stock held by them [separately] in said company.

7. That said amended bill asserts a different cause of action against the different material defendants joined in the cause, without sufficient grounds being stated or appearing for so doing, contrary to the equity rules of this court.

62 8. That it appears from the averments of said amended bill and stipulation of facts the action is for the recovery of a fine from these defendants, as and for the violation of a penal statute of the United States and it therefore seeks to hold these defendants to answer for an infamous crime without a presentment or indictment of the Grand Jury, contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

9. That it appears from said amended bill that the suit purports to be a proceeding in equity, while it also appears that the action is,

in fact, for the recovery of a fine from these defendants for the violation of a penal statute of the United States and is, therefore, a criminal prosecution, and deprived these defendants of a trial therein by jury contrary to the provisions of the Sixth Amendment to the Constitution of the United States.

10. That the action is in the nature of a criminal proceeding against these defendants, and has compelled and will compel them to be witnesses against themselves in a criminal case, contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

11. That the rendering and enforcing of the judgment against these defendants for any part of the sum sued for in said cause deprives them, and each of them, of their property without due process of law, contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

12. That the United States accuses the various defendants of a conspiracy punishable by section 37 of the Revised Penal Code of the United States (enacted March 4, 1909) and has compelled and will compel them by answering therein to be witnesses against themselves in a criminal case—contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

13. That all of the stockholders of said Waters Pierce Oil Company are necessary and proper parties to this proceeding, that this cause should not have proceeded without said stockholders being brought in as such parties, and that proceeding without them is inequitable and unjust to the present defendants and will result in a multiplicity of suits.

14. That the court erred in not ordering, adjudging and decreeing that the plaintiff is forever barred from proceeding in the present cause on account of the filing of the suit on February 4, 1916 by plaintiff in the United States District Court for the Western District of Louisiana against the Pierce Oil Corporation, the description of said suit being more particularly set out in the stipulation of facts filed in this cause; and in not ordering, adjudging and decreeing that said matters constitute an election of remedies, a waiver, and an estoppel and in not ordering, adjudging, and decreeing that on account of said matters the plaintiff in the present case has a plain and adequate and complete remedy at law.

63

15. That the decree entered in this cause is for the wrong party.

16. That the decree entered in this cause is inequitable, unjust, unfair, and unscionable.

17. That said judgment and decree in this cause is insufficient, indefinite, uncertain, and incapable of enforcement.

18. That said judgment and decree in this case is not in con-

formity with the pleadings and stipulation of facts and is inconsistent therewith and with itself.

19. That the court erred in not entering an order, judgment and decree in favor of these defendants and in not dismissing the bill against them.

20. That the court erred in not adjudging and decreeing that the plaintiff's only remedy is against the Pierce Oil Corporation, there being no proof of insolvency on the part of the Pierce Oil Corporation and no fraud on the part of the Waters Pierce Oil Company, its officers, directors or stockholders, nor on the part of the Pierce Oil Corporation and it appearing that the Pierce Oil Corporation assumed all of the debts and liabilities of the Waters Pierce Oil Company.

21. That this suit was prematurely brought in that, at the time of the filing of the original bill herein, no execution had been issued against the Waters Pierce Oil Company out of the United States District Court for the Western District of Louisiana, direct to the United States Marshal of the Eastern District of Missouri, and none was so issued until after the filing of the original bill in this cause.

22. That the plaintiff must secure a judgment in the State of Missouri or in the United States District Court sitting in the State of Missouri, against the Waters Pierce Oil Company before the plaintiff has a right to proceed in equity to reach equitable interests; that neither the bill nor stipulation of facts show- grounds for recovery in equity in that it is not alleged that any judgment has been obtained against, the Waters Pierce Oil Company in Missouri nor any effort to obtain one nor is it [aver-ed] or shown that
64 it was impossible to obtain one; and that under the ruling in the case of the National Tube Works Company vs. Ballou, 146 U. S. 517, and other cases, the present case is not well founded in equity.

23. That the execution issued out of the United States District Court for the Western District of Louisiana, after the filing of the original bill herein, is void, in that, there is no authority under the statutes and decisions to issue an execution of this character.

Wherefore, the appellants pray that said decree be reversed and that said district court for the eastern division of the eastern judicial district of Missouri be ordered to enter a decree reversing its decision in said cause and be ordered to set aside said decree and to enter a decree in favor of the defendants, Clay Arthur Pierce, Henry Clay Pierce and Pierce Investment Trust Company.

BOYLE AND PRIEST,
*Solicitors for Clay Arthur Pierce.*

FORDYCE, HOLLIDAY & WHITE,
*Solicitors for Henry Clay Pierce and Pierce Investment Trust Co.*

Endorsed: "Filed Mar. 22, 1918, W. W. Nall, Clerk."

(*Order Approving Appeal Bond, etc.*)

Now at this day come the defendants Clay Arthur Pierce, Henry Clay Pierce and the Pierce Investment Trust Company, and present their appeal bond in this cause, which is now approved by the Court and filed; and the said appealing defendants further file their joint election and praecipe for a transcript of the record herein.

(March 23rd, 1918.

DAVID P. DYER, *Judge.*)

(*Appeal Bond.*)

Know All Men By These Presents,

That we, Clay Arthur Pierce, Henry Clay Pierce and Pierce Investment Trust Company, as Principals, and National Surety Company as Surety, are held and firmly bound unto United States of America in the full and just sum of Five Hundred Dollars ($500.00) to be paid to the said United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 22nd day of March in the year of our Lord one thousand nine hundred and eighteen.

65

Whereas, lately at the September term A. D. 1917, of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, in a suit depending in said Court between United States of America plaintiff and Waters Pierce Oil Company, Henry S. Priest, Clay Arthur Pierce, Henry Clay Pierce and Pierce Investment Trust Company, defendants, final judgment and decree was rendered against the said Clay Arthur Pierce, Henry Clay Pierce and Pierce Investment Trust Company, and the said Clay Arthur Pierce, Henry Clay Pierce and Pierce Investment Trust Company have obtained an order of said court allowing an appeal from said judgment and decree of the said Court to reverse the said Judgment and decree in the aforesaid suit, and a citation directed to the said United States of America has been waived.

Now the condition of the above obligation is such, that if the said Clay Arthur Pierce, Henry Clay Pierce and Pierce Investment Trust Company shall prosecute said appeal to effect, and answer all costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue. The obligation of the surety is limited to the amount of this bond, to-wit, $500.00.

Sealed and delivered in presence of:

CLAY ARTHUR PIERCE,
By G. T. PRIEST; [SEAL.]
HENRY CLAY PIERCE,
By FORDYCE, HOLLIDAY & WHITE,
*His Attorneys.* [SEAL.]
PIERCE INVESTMENT TRUST COMPANY,
By FORDYCE, HOLLIDAY & WHITE,
*Its Attorneys.* [SEAL.]
*Principals.*
NATIONAL SURETY COMPANY,
By L. J. NICHOLS,
*Attorney in Fact,* [SEAL.]
*Surety.*

Approved by:

(Signed) DAVID P. DYER, *Judge.*

Endorsed: "Filed Mar. 23, 1918, W. W. Nall, Clerk."

66 *(Pxcipe for and Election as to Transcript.)*

To the Clerk of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri:

In preparing the testimony upon the defendants' appeal in the above entitled cause from the order entered on the 11th day of March 1918 which order was appealed from by the defendants to the Circuit Court of Appeals for the Eighth Circuit, you will please include in said transcript, a copy of the entire record and proceedings had in your District Court, except original and alias subpœnas in chancery, application for temporary injunction and entries of appearance and withdrawals of counsel. And appellants hereby elect to have said transcript printed under the supervision of the Clerk of the U. S. Circuit Court of Appeals.

BOYLE AND PRIEST,
*Attorneys for Clay Arthur Pierce, Defendant*
FORDYCE, HOLLIDAY & WHITE,
*Attorneys for Henry Clay Pierce and Pierce Investment Trust Company, Defendants.*

Service of the above Precipe is hereby acknowledged this 18th day of March, 1918.

W. H. WOODWARD,
*Attorney for Plaintiff.*

Endorsed: "Filed Mar. 23, 1918, W. W. Nall, Clerk."

(*Clerk's Certificate to Transcript.*)

UNITED STATES OF AMERICA,
*Eastern Division of the Eastern Judicial District of Missouri, ss:*

I, W. W. Nall, Clerk of the District Court of the United States, within and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings, in cause No. 4538, of United States of America, Complainant, vs. Waters Pierce Oil Company, Henry S. Priest, Clay Arthur Pierce, Henry Clay Pierce, and Pierce Investment Trust Company, Defendants, together with all things of and concerning the same (save as restricted by the praecipe for transcript hereinbefore set forth) as fully
67 as the same remains on file and of record in said cause in my office, and that the original waiver of issuance of citation is hereto attached and herewith returned.

In witness whereof, I hereunto set my hand and affix the seal of said District Court, at office in the City of St. Louis, in said Division of said District this 1st day of April, A. D. 1918.

[Seal U. S. Dist. Court, Eastern Division, East. Dist. of Mo.]

W. W. NALL,
*Clerk of said Court.*
By OTTO O. FICKEISSEN,
*Deputy Clerk.*

Filed Apr. 1, 1918. E. E. Koch, Clerk.

68 And thereafter the following proceedings were had in said cause, in the Circuit Court of Appeals, viz:

(*Appearance of Mr. Robert A. Hunter as Counsel for Appellee.*)

United States Circuit Court of Appeals, Eighth Circuit.

No. 5145.

CLAY ARTHUR PIERCE et al., Appellants,

vs.

UNITED STATES OF AMERICA.

The Clerk will enter my appearance as Counsel for the Appellee.
ROBERT A. HUNTER,
*Special Assistant to the Attorney General, Shreveport, Louisiana.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Apr. 12, 1918.

(*Appearance of Mr. G. T. Priest as Counsel for Appellants.*)

The Clerk will enter my appearance as Counsel for the Appellants.

G. T. PRIEST.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Apr. 17, 1918.

69 (*Appearance of Mr. W. H. Woodward as Counsel for Appellee.*)

The Clerk will enter my appearance as Counsel for the Appellee.

W. H. WOODWARD,
*Ass't U. S. Att'y.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Apr. 17, 1918.

(*Appearance of Messrs. Fordyce, Holliday & White and Mr. Truman Post Young as Counsel for Appellants.*)

The Clerk will enter my appearance as Counsel for the Appellants.

SAMUEL W. FORDYCE, Jr.
JOHN H. HOLLIDAY.
THOMAS W. WHITE.
TRUMAN POST YOUNG.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Apr. 19, 1918.

(*Appearance of Mr. Albert D. Nortoni as Counsel for Appellants.*)

The Clerk will enter my appearance as Counsel for the Appellants.

ALBERT D. NORTONI.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 27, 1918.

70 (*Order of Submission.*)

May Term, 1918.

Wednesday, May 29, 1918.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Albert D. Nortoni for Appellants, continued by Mr. Robert A. Hunter and Mr. W. H. Woodward for

the appellee and concluded by Mr. Truman P. Young for the appellants.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

71 (*Opinion on Merits.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1918.

No. 5145.

CLAY ARTHUR PIERCE et al., Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

Appeal from the District Court of the United States for the Eastern District of Missouri.

Mr. Albert D. Nortoni and Mr. Truman Post Young (Mr. Samuel W. Fordyce, Jr., Mr. John H. Holliday, Mr. Thomas W. White, Mr. George T. Priest and Mr. J. Markham Marshall on the brief), for appellants.

Mr. Robert A. Hunter, Special Assistant to the Attorney General, and Mr. W. H. Woodward, Assistant United States Attorney, for appellee.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

HOOK, *Circuit Judge*, delivered the opinion of the Court.

This suit in equity was brought by the United States in the United States District Court for the Eastern District of Missouri, against the Waters Pierce Oil Company, a Missouri corporation, and certain of its stockholders, to recover the amount of a judgment obtained against that company in the United States District Court for the Western District of Louisiana. The Government was given a decree against three of the stockholders and they appealed.

72 The facts, briefly stated, are these: In January, 1907, the Waters Pierce Oil Company was indicted in the court in Louisiana for receiving rebates on interstate shipments contrary to the Elkins Act (32 Stat. 847). In July, 1913, the Waters Pierce Oil Company sold and conveyed all its property and assets to the Pierce Oil Corporation, organized under the laws of Virginia, for $5,000,000 in money and $10,500,000 of the common stock of the latter. The vendee assumed all the vendor's "debts, liabilities and obligations". The money and shares of stock were lodged with trustees who distributed them ratably among the stockholders of the

Waters Pierce Oil Company, including the three appellants, and that company thereupon ceased business. In March, 1914, the case in Louisiana was tried with the result that the Waters Pierce Oil Company was convicted and fined $14,000. The offense under the Elkins Act was punishable by a fine only. In March, 1915, the judgment was affirmed by the Fifth Circuit Court of Appeals (137 C. C. A. 293, 222 Fed. 69). An execution was issued to the marshal of the Louisiana district and returned nulla bona in August, 1915. This suit was begun in February, 1916. In March, 1917, another execution was issued on the judgment in Louisiana, but directed to the marshal for the Eastern District of Missouri (see Rev. Stat. sec. 986; 3 U. S. Comp. Stat. 1916, sec. 1632); this execution was also returned nulla bona; and in August of that year the Government filed an amended complaint setting forth the facts regarding the second execution. The decree against the three appellants was not in excess of the amounts of money they received in the distribution of the proceeds of the sale. The controlling questions in the case are whether a judgment imposing a fine in a criminal prosecution by the United States may support a creditor's bill in aid of an execution that has proved fruitless; and, if so, whether the appellants can be held liable, to the extent of their distributive shares of the funds, for the judgment against their corporation under the circumstances of this case.

It is contended by the appellants that the relation of debtor and creditor is essential to a proceeding in equity in aid of an execution at law, that a liability to a fine for a penal offense does not give rise to the relation, and that the character of the judgment is determined by that of the liability upon which it is founded. The term "debt" has a variety of meanings, not a settled or invariable
73 one. It takes color from its surroundings. Whether the duty to pay a sum of money is or is not a debt depends upon the particular sense in which it is used. In a broad sense a debt may signify any duty to respond to another in money, labor or service. It may even mean a moral or honorary obligation unenforceable by legal action. United States v. Realty Co., 163 U. S. 427, 440. When used restrictively it may mean, without more, an obligation founded on contract to pay a definite or certain sum of money. There is much nice learning upon the subject, some of it of an historical character, but it need not be reviewed here. It is provided by an act of Congress that a judgment imposing a fine for an offense against the laws of the United States "may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced." (Rev. Stat. sec. 1041; 3 U. S. Comp. Stat. 1916, sec. 1705.) We think the provision of the statute is broad enough to embrace those processes and proceedings in aid of or supplemental to an execution that are customary in civil cases. A poor offender may escape a fine by taking the oath of poverty, but we do not think it was the intention to relieve one able to pay because his property is incorporeal or equitable in character, or one who, for the purpose of defeating the judgment, removes his tangibles beyond the reach of an ordinary writ of execution. As

employed in the statute, "execution" signifies generally the means for enforcing the judgments of courts in civil cases.

Upon the other question the Government contends that the Waters Pierce Oil Company rendered itself insolvent by the sale of all its property and the distribution of the proceeds among its stockholders; that upon the insolvency of a corporation its property becomes a trust fund for its creditors; and that in the case at bar the proceeds in the hands of the stockholders are substituted for the property and may be followed in a suit to enforce the trust. The Supreme Court has many times declared that the property of an insolvent corporation is held in trust for the benefit of its creditors. There is some question about the precise nature of the trust and when it arises. It has been said: "It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder." Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371.

74 Again, the trust has been held to arise at the moment of insolvency. McDonald, Receiver, v. Williams, 174 U. S. 397, 404. However this may be, the nearest approach to the case at bar in its facts is Swan Land and Cattle Co. v. Frank, 148 U. S. 603. There the plaintiff had an unliquidated claim for damages against three corporations which sold substantially all their property, distributed the proceeds and remaining assets among their stockholders, and quit business. There was, as here, no contention that otherwise than by the sale and the distribution of proceeds and assets the corporations were or became insolvent. The suit was against a part of the stockholders. The court said:

"The theory of the bill is, that the assets of the vendor corporations which have been distributed to and received by the defendants as stockholders constitute a trust fund for the payment of all debts and demands against the companies, and may, therefore, be followed in the hands of, and recovered from, such stockholders, to the extent necessary to discharge valid claims against the corporations from which they were received. The funds sought to be reached are undoubtedly applicable, under proper proceedings against all necessary parties, to the payment, so far as may be needed, of outstanding indebtedness against the corporations which distributed the same; but the difficulty here is that the complainant has not adopted the requisite and necessary procedure to subject said funds thereto. It has no judgment against the corporations by which it was defrauded, nor are such corporations made parties defendant to the suit or brought before the court."

The bill was ordered dismissed without prejudice because plaintiff's claim had not been reduced to judgment and the debtor corporations had not been made parties. Neither of the reasons which stood in the way of relief in that case are present in the case at bar. Here the Government has a judgment on which execution has been returned unsatisfied and the Waters Pierce Oil Company, the judgment debtor, is a party defendant. The case cited seems persuasive if not decisive of the liability of the appellants.

The assumption by the vendee company of the debts, liabilities and obligations of the Waters Pierce Oil Company does not relieve the stockholders who have received the proceeds of the sale of the assets of their corporation from responsibility to a creditor.
75 Though it may be said that an action against the vendee might be maintained upon the ground of a contract between two persons for the benefit of a third, the remedy is not exclusive in the absence of novation when one of the contracting parties is the primary debtor. The assumption by the vendee company is rather for the assurance and benefit of the Waters Pierce Oil Company and its stockholders. What we have said of the liability of stockholders in a case like that at bar must not be understood as applying to a case of consolidation of corporations by authority of law, nor to the reorganization of the affairs of an insolvent corporation according to the settled principles of equity.

The decree is affirmed.

Filed April 15, 1919.

WADE, *District Judge*, dissenting:

I cannot concur in the majority opinion, for the reason that, as I view the case, the plaintiff (in the trial court) had an adequate remedy at law, and that resort to the extraordinary remedies here sought in a court of equity cannot be had, in any event, until such legal remedies are exhausted.

If this judgment is a "debt" as held by the majority, it is certainly covered by the express language of the contract by which the Pierce Oil Corporation assumed "all debts, obligations and liabilities of the Waters Pierce Oil Company" and the plaintiff could have proceeded in an ordinary suit at law to recover upon such covenant.

It may be true, as stated in the majority opinion that "the assumption by the vendee company of the debts, liabilities and obligations of the Waters Pierce Oil Company does not relieve the stockholders who have received the proceeds of the sale of the assets of their corporation from responsibility to a creditor," but the creditor is only interested in getting his money, and if he can get it by an ordinary law action, he cannot invoke the powers of a court of equity. I can also agree that "the remedy (against vendee) is not exclusive," but I hold that resort must first be had to the ordinary remedy at law, and that plaintiff can come into equity only when that fails; not only this, but in equity and in justice, the vendee should pay
76 this judgment if any one does. For a valuable consideration it agreed to pay this judgment (if it is a debt, obligation or liability), and the stockholders who received nothing except what they were legally entitled to should not be held primarily liable.

I agree with the majority that the assets of a corporation constitute in a sense a trust fund which under certain circumstances may be subjected in the hands of stockholders to the payment of cor-

porate debts. But this is not an action to reach certain "assets" of the corporation; it is an action for a personal judgment against the stockholders. It is not averred that they now have any of the assets, nor is it sought to trace these "trust funds" into anything that defendants now own. So far as the record discloses, these defendants did not have at the time of the trial, a dollar or a share of stock received at the time of the distribution. Under these circumstances, if liable, why are they liable? Their liability can rest only upon the fact that they are wrongdoers, because by fraud (actual or constructive), they have been parties to the dissipation of the assets of the corporation which the corporation should have first applied to the payment of its obligations.

The plaintiff is in no position to refuse to proceed at law. There are no equities in its favor. The indictment rested untried for six years before the transfer of the property was made. It was not brought to trial for nearly a year after the transfer. It is in no position to appeal for special relief, certainly not against men who, as stockholders of the old and of the new corporations, made specific provision for the payment of all debts, obligations and liabilities.

Furthermore, the record shows that on February 4, 1916, before this action was commenced on February 18, 1916, the plaintiff had brought suit at law in Louisiana to enforce against the vendee the covenant of assumption to pay all the "debts, obligations and liabilities of the Waters Pierce Oil Company" and that such action at law is still pending. I do not hold that this is an absolute election of remedies, but I do hold, that having so elected and proceeded, and it not being claimed that the remedy in that Court is not adequate, this Court should grant no relief.

77 If these defendants are liable, such liability is only secondary; if the judgment can be enforced against the Waters Pierce Oil Company or its vendee, the defendants are not liable at all.

Filed April 15, 1919.

78 (*Decree.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1918.

Monday, April 28, 1919.

No. 5145.

CLAY ARTHUR PIERCE, HENRY CLAY PIERCE and PIERCE INVESTMENT TRUST COMPANY, Appellants,

vs.

UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this Court.

April 28, 1919.

79 In the United States Circuit Court of Appeals, Eighth Circuit.

No. 5145.

CLAY ARTHUR PIERCE, H. CLAY PIERCE, PIERCE INVESTMENT TRUST COMPANY, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

Appeal from the District Court of the United States for the Eastern District of Missouri.

*Petition of Appellants for a Rehearing.*

May it please the Court:

Clay Arthur Pierce, H. Clay Pierce and the Pierce Investment Trust Company, appellants in the above-entitled cause, come now and move this Court for a rehearing in this case, and for such other and further proceedings therein as to this Court may seem just and proper.

80 For grounds for granting of this petition, appellants show to the Court:

1. The decree of the District Court below awarded interest at 6 per cent from January 29, 1907 (Rec., pp. 58 and 59). The indictment was filed on January 29, 1907. Conviction was obtained at the trial on March 20, 1914 (Rec., p. 2). Thus it is seen that the court below awarded interest, not from the date of conviction, but from the date of the indictment. This interest amounts to over $10,000.00. It is well settled under the authorities that no interest can be allowed on a judgment for a penalty under the criminal statutes.

United States v. Jacob Schmidt Brew. Co., 254 Fed. 714.
State v. Streen, 14 Tex. 396, 398.
People v. Railway, 129 Cal. 545, 79 Am. St. Rep. 137.

Certainly if judgments for fines do not bear interest there can be no allowance of interest from the time of the indictment. To allow interest from the date of the indictment would do away entirely with the presumption of innocence of the accused, and assumes that a debt was created as due to the United States by the defendant at the time of the indictment. We contend that these propositions are untenable and not supported by the authorities. In the case of the United States v. Jacob Schmidt Brewing Co., supra, the Court said:

"Judgments imposed as a punishment for the violation of a criminal law stand in a class by themselves. They do not survive the death of the party against whom they are entered, so as to be
81 a charge upon his estate (United States v. Mitchell [C. C.], 163 Fed. 1014; United States v. Dunne, 173 Fed. 254, 97 C. C. A. 420, 19 Ann. Cas. 1145). California has a statute almost identical with that of the State of North Dakota, and it has been ruled under that statute that judgments imposed as a fine for the violation of criminal law, do not bear interest (People ex rel. Warfield v. Sutter, 129 Cal. 545, 62 Pac. 104, 79 Am. St. Rep. 137).

This subject, however, is settled for Federal Courts by Section 966 of the Revised Statute (Section 1605 of United States Compiled Statutes for 1916). That statute provides as follows: 'Interest shall be allowed on all judgments in civil causes, recovered in a Circuit or District Court, etc.'

Congress having undertaken to deal with the subject of interest upon judgments, and having expressly restricted the allowance of interest to judgments in civil causes, the implication is strong that judgments in criminal causes do not bear interest.

My conclusion, therefore, is that the Government is not entitled to interest upon the judgment in the above-entitled cause."

We submit that the Court erred in allowing any interest whatever.

2. In the oral argument before this Court, it was argued that the United States was a subsequent creditor, if a creditor at all, and hence

was not in a position to question the transfer of the property of the Waters Pierce Oil Company to the Pierce Oil Corporation. We furnished authorities to the Court by an extra typewritten page in the brief; it appears that this point was overlooked and was
82 not touched upon in the opinion of the Court.

The conviction was obtained on March 20, 1914. The transfer by the Waters Pierce Oil Company to the Pierce Oil Corporation took place on July 9, 1913. If a debt was created by the conviction, it was not created until that day; hence, since the transfer took place previous to the conviction, the United States was a subsequent creditor, if a creditor at all. In the case of Graham v. Railroad, 102 U. S. 148, 26 Law Ed. 106, l. c. 111, the Court said:

"We see no reason why the disposal by a corporation of any of its property should be questioned by subsequent creditors of the corporation, any more than a like disposal by an individual of his property should be so questioned; the same principles of law apply to each."

3. The Court in the majority opinion lays stress on the statute of the United States authorizing the collection of a judgment for crime as in civil cases (R. S., Section 1041; 3 U. S. Comp. Stat. 1916, Sec. 1705). This statute provides only for execution; there is no provision for a creditor's bill. This statute does not attempt to give a judgment for a fine the attribute of a debt where there was no debt before. A judgment for a fine cannot be proved against the estate of a deceased defendant and does not draw interest, nor has it any other attribute of a debt. (See cases cited under point 4 of this petition.)

There is nothing in this statute to show that Congress intended to convert a judgment for a fine into a debt, so as to make it a basis for a creditor's bill. The statute is remedial only and merely recognizes the rights that theretofore existed. A debt arises
83 out of contract, express or implied. Congress cannot make contracts for the parties. The statute as construed by the majority opinion and applied in this case, is void, for it would infringe upon the sacred rights of every citizen with respect to the right of contract.

The statutes of the United States, therefore, do not authorize the collection by means of a creditor's bill of a fine imposed as criminal punishment. The statutes regulate the manner of collecting fines. The criminal laws of the United States are entirely statutory, hence any criminal remedy must be found in the statutes of the United States (Jones v. United States, 137 U. S. 202; R. S., section 1041).

4. The appellants contend that a creditor's bill can be brought only for the collection of civil debts, and that it cannot be used as ancillary to a criminal prosecution; and that a fine imposed as a punishment can, because of its very nature, be imposed only against the person convicted of the crime. The Waters Pierce Oil Company was adjudged guilty of the crime in question and not the stockholders of that company. A judgment assessing the fine does not convert

the fine of the Waters Pierce Oil Company into a debt, nor does the Government become a creditor. In the matter of Schreiber, 110 U. S. 76, 28 Law Ed. 65, the Court held that an action for a penalty under the statutes of the United States did not survive against the legal representations of the deceased defendant. In the case of United States v. Dunne, 173 Fed. 254 (C. C. A., 9th Cir.), the Court holds that a judgment for a statutory penalty, under the statutes of the United States, cannot be made the basis of a claim of the United States against the estate of the deceased defendant. The Court
84 further held that the merging of the penalty into a judgment did not change the essential nature of the penalty. In the case of Chicago v. Morrell, 247 Ill., 283, the Court held that a penalty imposed in violation of a city ordinance was not a debt. Peterson v. State, 79 Neb. 132, holds that a penalty for violation of a speed ordinance was not a debt, within the constitutional prohibition against imprisonment for debt. Hall v. Colman, 130 Ga. 734, held that a fine was not a debt due the State. Spalding v. State ex rel. Backus, 45 U. S. 21, held that a fine for violation of an injunction was not a debt so as to be affected by a discharge in bankruptcy. In re Southern Steel Co., 183 Fed. 498, held that a statutory penalty for cutting trees was not a debt. State v. American, 141 N. C. 726, held that a fine in bastardy proceedings is not a debt. In re Sutherland, 23 Fed. Cas. 456, 457, holds that a fine is not a debt provable in bankruptcy. Spalding v. People, 7 Hill 301, held that a fine is not a debt discharged in bankruptcy. Whiteacre v. Rector (Va.), 26 Am. Rep. 420, holds that a fine is not a debt within the meaning of the law exempting homesteads from levy in satisfaction of a debt. United States v. Jacob Schmidt Brew. Co., 254 Fed. 714, holds that a judgment for a fine does not bear interest.

From the foregoing authorities it can be readily seen that a fine cannot be considered a debt for the purpose of creating the relationship of debtor and creditor. Since there is no debtor there can be no creditor. A creditor's bill cannot be based upon a fine. No case has been cited by the Government, nor was any cited by the majority opinion, where a creditor's bill was allowed in the collection of a fine for violation of a penal statute. We respectfully submit
85 that the majority opinion was therefore erroneous in holding that the bill in the present case can be maintained.

The following authorities seem to demonstrate conclusively that the fine in question cannot be enforced against the stockholders of the Waters Pierce Oil Company, who had no part in the committing of the crime in question:

United States v. Thurer, 213 Fed. 964.
Dyar v. United States, 186 Fed. 614.
United States v. Mitchell, 163 Fed. 1044.
In re Green, 52 Fed. 104.
United States v. Wood, 145 Fed. 405.
Pacific Coal Co. v. United States, 173 Fed. 737.
New York Central v. United States, 212 U. S. 481.

5. The appellee had a plain, adequate and complete remedy at law, and this remedy at law had not been exhausted. Section 263 of the Judicial Code provides that:

"Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law."

The contract between the Waters Pierce Oil Company and the Pierce Oil Corporation expressly provided for the settlement of all "debts, liabilities and obligations" of the Waters Pierce Oil Company. Assuming that the Court is right in its majority opinion that the liability of the Waters Pierce Oil Company on the judgment in question is a debt, then it is one of the debts expressly contracted to be paid by the Pierce Oil Corporation.

86 The bringing of the suit by the United States on this contract acted as an election on the part of the United States to pursue its remedy at law. After having filed suit on the contract, the Government then brought the present suit in equity. The Waters Pierce Oil Company turned over to the Pierce Oil Corporation all of its assets, and the Government saw fit to proceed against the Pierce Oil Corporation to secure part of these assets with which to satisfy the judgment in question.

We contend that the action of the Government in the proceedings in the Louisiana case is conclusive evidence against appellee that the Government has a remedy at law. We respectfully submit that there is no better way of showing that a party has a remedy at law than that he has already filed a suit at law. We have always understood that a court of equity would not give its extraordinary remedy and relief where a party had already solemnly stated that he had a remedy at law, and was proceeding with that remedy.

There is no suggestion that the remedy in the Louisiana case is inadequate, or that if a judgment is secured, the judgment will not be paid. There is no suggestion that the remedy in the Louisiana case is incomplete; indeed, the very pendency of the suit is evidence that the Government considered it the proper remedy to secure the necessary relief.

Unless we are to disregard Section 263 of the Judicial Code entirely, we fail to see how the Court can practically overlook the pendency of the Louisiana case.

6. We submit that the Court erred in the majority opinion in holding the trust fund theory applicable. The trust fund

87 theory is that upon insolvency of a corporation, its property becomes a trust fund for its creditors. In the present case there was no creditor since there was no debtor, as we have heretofore pointed out.

The judgment below was a general judgment against the stockholders of the Waters Pierce Oil Company. There was no judgment fastened upon any assets of the Waters Pierce Oil Company. The judgment did not follow the physical property of the Waters

Pierce Oil Company into the hands of the Pierce Oil Corporation. The Government is in no position to insist upon the trust fund theory, especially as it now has a suit at law pending in Louisiana by which it seeks to hold the Pierce Oil Corporation liable for having secured all the assets of the Waters Pierce Oil Company.

Neither the Pierce Oil Corporation nor the Waters Pierce Oil Company were ever insolvent. It is not alleged, nor was it ever claimed, by the Government, that the Waters Pierce Oil Company or the Pierce Oil Corporation were guilty of any fraud in attempting to evade the fine in question, or in attempting to evade any of their obligations. There is no allegation in the bill, nor was it ever claimed by the Government, that the stockholders of the Pierce Oil Corporation were guilty of any fraud, or attempted to perpetrate any fraud. We cannot see how the trust fund theory is applicable, and we submit the majority opinion is erroneous in this regard.

Hageman v. Railroad, 202 Mo., l. c. 264.
Colman v. Hagey, 252 Mo. 102, l. c. 136.
Hollins v. Briersfield Co., 150 U. S., l. c. 385.
Gresham v. Railroad, 102 U. S. 148.
Wabash Co. v. Ham, 114 U. S., l. c. 594.
Savings Bank v. Ritchey, 121 Fed. 956, 959.

88 7. The Court did not consider, or at least did not give serious consideration to, our assignments of error, Nos. 3, 4, 5, 6 and 7 (Appellant's Brief, p. 6), which set forth that the bill is multifarious and that there were misjoinders of parties defendant and causes of action. We respectfully submit that the bill should be dismissed for this cause.

Savings Bank v. Ritchey, 121 Fed. 956.
Central Bank v. Fitzgerald, 94 Fed. 16.
Hayden v. Thompson, 67 Fed. 273, l. c. 276.

8. The Court did not consider, or at least did not give seriour consideration to, our assignments of error, Nos. 8, 9, 11 and 12 (Appellant's Brief, p. 7). We are firmly of the opinion that there is no power in the Congress or courts of the United States to impose a punishment for crime on individuals who are not alleged to have had the slightest part in it, and that any statute or decision securing such result, would be unconstitutional. This would require the defendants to answer for an infamous crime without a presentment or indictment of the grand jury, contrary to the Fifth Amendment of the Constitution of the United States, and would deprive the defendants of a trial by jury, contrary to the Sixth Amendment of the Constitution of the United States, and would deprive the defendants of their property without due process of law, contrary to the Fifth Amendment of the Constitution of the United States. If the defendants are accused of a conspiracy punishable by Section 37 of the Revised Penal Code of the United States (March 4, 1909), then

89 the defendants have been compelled to be witnesses against themselves in a criminal case, contrary to the Fifth Amendment of the Constitution of the United States.

In re Neilson, 131 U. S. 176.
In re Bonner, 151 U. S. 242.

9. The present suit was prematurely brought, in that no execution had been issued out of the Louisiana court at the time of the filing of the suit, and none was issued until after the filing of the original bill in this cause. There is no allegation nor stipulated fact to show that a judgment had been obtained against the Waters Pierce Oil Company in Missouri, nor any effort made to obtain one, nor that it was impossible to obtain one.

Under the decision of the National Tool Works v. Ballou, 146 U. S. 517, the present case is not well founded in equity; the practice in a case like this one at bar has always required the securing of a judgment in the district where the suit in equity is brought. In order to maintain a creditor's bill, the creditor must first show he has secured a judgment in this district. Under the Ballou case the bill cannot be maintained. This point was not mentioned in the majority opinion, and we submit that this ruling of the Supreme Court requires a dismissal of the bill.

We are reluctant to present a motion for a rehearing to this busy court. However, we earnestly believe that the matters involved are of such great moment, not only to the United States but to the parties defendants, that we are doing our duty in calling the Court's attention to what we believe were errors, and that the dissent-
90 ing opinion filed herein adds color to our position.

Respectfully submitted,

S. W. FORDYCE, Jr.,
JOHN H. HOLLIDAY,
THOMAS W. WHITE,
GEORGE T. PRIEST,
ALBERT D. NORTONI,
J. MARKHAM MARSHALL,
*Solicitors for Appellants.*

*Certificate of Counsel.*

We, Thomas W. White and George T. Priest, Albert D. Nortoni, solicitors for appellants, hereby certify that in our judgment the foregoing petition for a rehearing is true in fact and point of law and is not interposed for delay.

THOS. W. WHITE,
GEO. T. PRIEST,
ALBERT D. NORTONI,
*Solicitors for Appellants.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 23, 1919.

91 (*Opinion on Rehearing.*)

United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D., 1919.

No. 5145.

CLAY ARTHUR PIERCE, H. CLAY PIERCE, PIERCE INVESTMENT TRUST COMPANY, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

Appeal from the District Court of the United States for the Eastern District of Missouri.

On Petition for Rehearing.

Before Hook and Stone, Circuit Judges, and Wade, District Judge.

*Per Curiam:*

It is urged that the trial court erred in the matter of interest included in the judgment under review. As this question was not raised by the assignments of error and briefs at the hearing we do not think it should be considered now. The other matters in the petition for rehearing were fully considered and we see no reason for changing the conclusion.

The petition is denied.

Wade, District Judge, adheres to the views expressed in his dissenting opinion previously filed.

Filed July 15, 1919.

92 (*Order Denying Petition for Rehearing.*)

May Term, 1919.

Tuesday, July 15, 1919.

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Appellants.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

July 15, 1919.

*(Petition for Appeal to Supreme Court, U. S., and Allowance Thereof.)*

The above named appellants, Clay Arthur Pierce, Henry Clay Pierce and Pierce Investment Trust Company, conceiving themselves aggrieved by this action of this honorable Court in entering the decree of April 28, 1919 therein, and in entering the order of July 15, 1919, overruling appellants' petition for re-hearing, do hereby appeal from said decree and order to the Supreme Court of the United States, and do pray that this, their appeal, may be allowed, and that a transcript of the record and proceedings and papers upon which said decree and order were made and duly authenticated may be sent to the Supreme Court of the United States.

BOYLE AND PRIEST,
ALBERT D. NORTONI,
FORDYCE, HOLLIDAY & WHITE,
*Attorneys for Appellants.*

Now, to-wit, on this 4th day of August, 1919, it is ordered that the appeal be allowed as prayed for.

KIMBROUGH STONE,
*U. S. Circuit Judge in and for the Eighth Circuit.*

93 (Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 6, 1919.

*(Assignment of Errors on Appeal to Supreme Court U. S.)*

Now come Clay Arthur Pierce, Henry Clay Pierce, and Pierce Investment Trust Company, Appellants in the above entitled cause, and file the following assignment of errors, upon which they will rely in their prosecution of the appeal in the above entitled cause from the decree of the Circuit Court of Appeals, entered April 28th, 1919, to the Supreme Court of the United States:

I. That the Court of Appeals erred in refusing to hold that the District Court erred in refusing to dismiss the first amended bill and in overruling appellants' separate motions to that end, for the reason that:

a) Said amended bill does not state a cause of action cognizable in equity.

b) Said amended Bill is multifarious, in that it sets forth separate and distinct claims or causes of action against separate defendants.

*c*) That there is a misjoinder of parties defendant in that stockholders are joined with trustees for a corporation and the alleged claim or cause of action does not affect them in the same capacity or affect the same res.

*d*). Said amended bill shows upon its face that complainant therein has a plain, adequate and complete remedy at law.

*e*) It appears from said bill that necessary parties defendant, to-wit: the remaining stockholders of the Waters Pierce Oil Company are not joined as defendants therein.

II. The Court of Appeals erred in failing and refusing to hold that the action of the District Court in compelling appellants
94 to answer to the bill and in awarding a decree against appellants deprived them of rights guaranteed by the Fifth Amendment to the Constitution of the United States, in that appellants were compelled to answer for an infamous crime without presentment or indictment of a grand jury, and were compelled to be witnesses against themselves in a criminal case, and were thus deprived of their property without due process of law.

III. The Court of Appeals erred in failing and refusing to hold that the action of the District Court deprived appellants of a trial by jury in an action for the recovery of a fine under a penal statute, contrary to the provisions of the Sixth Amendment to the Constitution of the United States.

IV. That the allegations of the bill charged defendants with a conspiracy to defraud the United States, in violation of Section 37 of the Penal Code and that by compelling appellants to answer said bill they have been compelled to be witnesses against themselves and are deprived of a jury trial, in violation of the provisions of the Sixth Amendment to the Constitution of the United States, and the Court of Appeals erred in failing and refusing so to hold.

V. The Court of Appeals erred in failing and refusing to hold that the filing of the suit on February 4th, 1916, by the United States of America against the Pierce Oil Corporation, filed within the Western District of Louisiana upon the same cause of action set forth in the bill herein, constituted an election of remedies, and in failing and refusing to hold that such election barred the maintenance of the present suit.

VI. The Court of Appeals erred in failing and refusing to hold that the filing of a suit by the United States on February 4th, 1916, in the Western District of Louisiana, against the Pierce Oil Corpor-
ation, constituted an acceptance of the offer contained in the
95 contract between the Waters Pierce Oil Company and the Pierce Oil Corporation, in which the latter assumed the debts and obligations of the former, and in failing and refusing to hold

that the filing of such suit constituted a novation and released the Waters Pierce Oil Company.

VII. The Court of Appeals erred in failing and refusing to hold that under the agreed statement of facts the plaintiff had a plain, adequate and complete remedy at law.

VIII. The Court of Appeals erred in affirming the decree of the District Court in awarding the United States interest from the date of the indictment within the Western District of Louisiana, towit: January 29th, 1907, when conviction thereupon was not obtained until March 20th, 1914, and erred in affirming the award of interest upon the judgment obtained on said last named date.

IX. The Court of Appeals erred in holding that the judgment for a fine constituted a debt on which a creditor's bill would lie and enforceable by such civil remedy in equity.

X. The Court of Appeals erred in failing and refusing to hold that such alleged debt, if a debt at all, was not enforceable in this proceeding, for that such debt, if a debt, constituted the United States a subsequent creditor and it is therefore not entitled to maintain this bill.

XI. The Court of Appeals erred in failing and refusing to hold that the suit was prematurely brought, in that at the time of the filing of the original bill no execution had been issued to the Marshall of the Eastern District of Missouri against the Waters Pierce Oil Company and in that no judgment at law had been secured in the Eastern District of Missouri before the filing of said suit.

XII. The Court of Appeals erred in refusing to grant appellants' petition for rehearing for the reasons therein stated.

96 Wherefore, appellants pray that said decree be reversed and that the Circuit Court of Appeals of the United States for the Eighth Circuit be ordered to enter a decree reversing its decree of April 28th, 1919, and that a decree in favor of appellants and dismissing respondent's bill be entered.

BOYLE & PRIEST,
*Solicitors for Clay Arthur Pierce.*
FORDYCE, HOLLIDAY & WHITE,
*Solicitors for Henry Clay Pierce and Pierce Investment Trust Company.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 6, 1919.

(*Stipulation as to Supersedeas Bond on Appeal to Supreme Court, U. S.*)

It is agreed that with the consent of the Court, the United States of America will not interpose any objection to a bond in the penal sum of thirty thousand dollars ($30,000.00), acting as a supersedeas in this cause.

BOYLE & PRIEST,
ALBERT D. NORTONI,
FORDYCE, HOLLIDAY & WHITE,
*Attorneys for Appellant.*

ROBERT A. HUNTER,
BENJ. L. WHITE,
*Attorneys for Appellee.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 6, 1919.

97 (*Bond on Appeal to Supreme Court, U. S.*)

Know all men by these presents, That we, Clay Arthur Pierce, Henry Clay Pierce and Pierce Investment Trust Company, a corporation, as principal, and Maryland Casualty Company, a corporation, of Baltimore, Maryland, as surety, are firmly bound unto the United States of America, in the sum of thirty thousand dollars ($30,000.00), to be paid to the said United States of America, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 28th day of July, 1919.

Whereas, the above named Clay Arthur Pierce, Henry Clay Pierce and Pierce Investment Trust Company have prosecuted an appeal to the Supreme Court of the United States, to reverse the decree rendered in the above entitled cause by the Circuit Court of Appeals, for the Eighth Circuit.

Now, therefore, the condition of this obligation is such that if the above named Clay Arthur Pierce, Henry Clay Pierce and Pierce Investment Trust Company shall prosecute said appeal to effect, and answer all damages and costs, and pay such sum as awarded in said decree, if they fail to make said appeal good, then this obligation shall

be void, otherwise the same shall be and remain in full force and effect.

CLAY ARTHUR PIERCE,
By BOYLE AND PRIEST.
ALBERT D. NORTONI.
HENRY CLAY PIERCE,
By FORDYCE, HOLLIDAY & WHITE,
*His Atty'-.*
PIERCE INVESTMENT TRUST COMPANY,
By FORDYCE, HOLLIDAY & WHITE,
*Its' Att'y-.*
MARYLAND CASUALTY COMPANY,
By LAURENCE H. PHISTER.

[SEAL.]

98 Approved:

KIMBROUGH STONE,
*U. S. Circuit Judge.*

(Power of Attorney attached to original bond.)

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 6, 1919.

(*Præcipe for Transcript on Appeal to Supreme Court, U. S.*)

The clerk, in preparing the record on appeal to the Supreme Court of the United States, in the above entitled cause, will include the following:

1. The transcript of record as filed in the Court of Appeals, on appeal from the District Court.

2. The minutes and record entries of proceedings in the Circuit Court of Appeals.

3. The opinion of the Circuit Court of Appeals and dissent of Wade, J.

4. Judgment and decree of the Circuit Court of Appeals.

5. Petition for re-hearing and per curiam opinion overruling same.

6. Petition for appeal and the allowance thereof.

7. Stipulation.

8. Supersedeas bond.

9. Assignment of errors and prayer for reversal.

99 10. Citation.

BOYLE AND PRIEST,
ALBERT D. NORTONI,
FORDYCE, HOLLIDAY & WHITE,
*Attorneys for Appellants.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 6, 1919.

100 United States of America to United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from and after the date hereof, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein Clay Arthur Pierce, Henry Clay Pierce and Pierce Investment Company are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Kimbrough Stone, United States Circuit Judge in and for the Eighth Circuit, this 4th day of August, A. D. 1919.

KIMBROUGH STONE,
*United States Circuit Judge for the Eighth Circuit.*

*Marshal's Return.*

UNITED STATES OF AMERICA,
*Eastern Division of the Eastern Judicial District of Missouri, ss:*

I do hereby certify that in the City of St. Louis, in the State of Missouri, in the Eastern Division of the Eastern Judicial District of Missouri, on the Sixth day of August, 1919, I executed the within writ, by delivering a true and correct copy thereof, as furnished by the Clerk of the Court, to Benjamin L. White, Assistant United States Attorney, for the Eastern District of Missouri, and who is and was in charge of the office of the United States Attorney at St. Louis, Missouri, at the time of said service.

JOHN E. LYNCH,
*United States Marshal,*
By G. S. LYNCH,
*Deputy.*

[Endorsed:] No. 5145. Clay Arthur Pierce et al., Appellants, vs. United States of America. Citation on Appeal to Supreme Court U. S. Filed Aug. 6, 1919. E. E. Koch, Clerk, No. 3565.

101 *(Clerk's Certificate.)*

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the præcipe of counsel for appellants, in a certain cause in said Circuit Court of Appeals wherein Clay Arthur Pierce, et al., were Appellants, and the United States of America was appellee, No. 5145, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with Marshal's return of service is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit at office in the City of St. Louis, Missouri, this nineteenth day of August, A. D. 1919.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
*Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.*

Endorsed on cover: File No. 27,293. U. S. Circuit Court Appeals, 8th Circuit. Term No. 538. Clay Arthur Pierce, Henry Clay Pierce and Pierce Investment Company, Appellants, vs. The United States of America. Filed September 8th, 1919. File No. 27,293.

FILE COPY

FILED
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JAMES D. MAHER,
CLERK.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

CLAY ARTHUR PIERCE, HENRY CLAY PIERCE and PIERCE INVESTMENT TRUST COMPANY,
*Petitioners,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

No. ~~588~~ 173

## PETITION FOR CERTIORARI.


THOMAS W. WHITE,
LEVI COOKE,
*Counsel for Petitioners.*

S. W. FORDYCE, JR.,
JOHN H. HOLLIDAY,
ALBERT D. NORTONI,
*Of Counsel.*



St. Louis Law Printing Co., Ninth and Walnut Sts. Bell, Main 1818.

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

CLAY ARTHUR PIERCE, HENRY CLAY PIERCE and PIERCE INVESTMENT TRUST COMPANY,
*Petitioners,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

No. ———

## PETITION FOR CERTIORARI.

*To the Supreme Court of the United States of America:*

The petition of Clay Arthur Pierce, Henry Clay Pierce and Pierce Investment Trust Company for writ of *certiorari*, directed to the United States Circuit Court of Appeals for the Eighth Circuit, to bring before the Supreme Court the case of Clay Arthur Pierce, Henry Clay Pierce and Pierce Investment

Trust Company, Appellants, v. United States of America, Respondent.

The said petitioners respectfully show to the Court as follows:

I.

That on January 29, 1907, at the January Term of the District Court of the United States for the Western District of Louisiana, held at the City of Alexandria, in said State, an indictment was returned and filed against the Waters Pierce Oil Company, a corporation of the State of Missouri, which charged the defendant, Waters Pierce Oil Company, with receiving certain rebates and concessions in violation of the Elkins Act of February 19, 1903 (39 Stat. 847); that said cause proceeded to trial on March 20, 1914, and the jury returned a verdict of "guilty", upon which the Court entered judgment in favor of the plaintiff, the United States of America, for the sum of fourteen thousand dollars and costs; that, thereafter, to wit, on April 21, 1914, the Waters Pierce Oil Company was allowed a writ of error, without *supersedeas*, to the United States Circuit Court of Appeals, for the Fifth Circuit, and upon hearing duly had the Circuit Court of Appeals affirmed the judgment of the District Court, and the mandate of the Court of Appeals affirming said judgment was filed in the District Court on June 23, 1915; that, there-

after, an execution upon said judgment was issued out of said District Court, directed to the United States Marshal for the Western District of Louisiana, upon which, on August 2, 1915, the Marshal made and filed a *nulla bona* return.

II.

That at an adjourned regular meeting of the board of directors of the Waters Pierce Oil Company, held on July 9th, 1913, in the City of St. Louis, State of Missouri, the said board of directors, pursuant to a request of holders of more than four-fifths of the capital stock of the Waters Pierce Oil Company authorized the sale of all the property of said corporation to the Pierce Oil Corporation, a corporation organized under the laws of the State of Virginia, for and in consideration of ten million five hundred thousand dollars ($10,500,000.00) of the common capital stock of said Pierce Oil Corporation, and five million dollars ($5,000,000.00) in lawful money of the United States; that Clay Arthur Pierce and Henry S. Priest were appointed by the board of directors as liquidating agents of the Waters Pierce Oil Company, to receive from the Pierce Oil Corporation the consideration aforesaid, and distribute the same among the stockholders of the Waters Pierce Oil Company.

III.

That pursuant to the authority of the board of directors, Clay Arthur Pierce and T. F. Lyden, president and secretary, respectively, of the Waters Pierce Oil Company, and acting for that company, by an indenture dated July 7, 1913, conveyed to the Pierce Oil Corporation all the property and assets of the Waters Pierce Oil Company.

IV.

That Clay Arthur Pierce and Henry S. Priest, as liquidating agents for the Waters Pierce Oil Company, received from the Pierce Oil Corporation ten million five hundred thousand dollars ($10,500,000.00), par value of the common stock of the Pierce Oil Corporation, and five million dollars ($5,000,000.00) in cash, and that they distributed the same *pro rata* among the stockholders of the Waters Pierce Oil Company.

V.

That at the time of the transfer by the Waters Pierce Oil Company of its property and assets to the Pierce Oil Corporation, Henry Clay Pierce was the owner of two thousand seven hundred twenty-seven (2,727) shares of the common stock of the Waters Pierce Oil Company; that the Pierce Invest-

ment Trust Company was the owner of one thousand (1,000) shares of said stock; that Clay Arthur Pierce was the owner of one share of said stock, and that the total number of shares of stock issued by said company and outstanding at said time was four thousand (4,000) shares.

## VI.

That Henry Clay Pierce received from the liquidating agents the sum of three million four hundred eight thousand seven hundred fifty dollars ($3,408,750.00), and that Pierce Investment Trust Company received the sum of one million two hundred fifty thousand dollars ($1,250,000.00), and that Clay Arthur Pierce received the sum of one thousand two hundred fifty dollars ($1,250.00), and that they each received stock of the Pierce Oil Corporation in the amounts and of the value as set opposite their respective names, as follows:

| | Number of Shares. | Value. |
|---|---|---|
| Henry Clay Pierce..... | 71,583¼ | $7,158,375.00 |
| Pierce Investment Trust Company ..... | 26,250 | 2,625,000.00 |
| Clay Arthur Pierce..... | 26¼ | 2,625.00 |

## VII.

That subsequent to the transfer by the Waters Pierce Oil Company of all its property and assets,

the Waters Pierce Oil Company was without funds and ceased to be a going concern, but retained and does retain its corporate identity.

VIII.

That, on February 4, 1916 (and prior to the filing of the creditor's bill in the Eastern District of Missouri), the United States filed in the Western District of Louisiana a bill of complaint against the Pierce Oil Corporation, seeking to recover from the Pierce Oil Corporation the amount of the fine theretofore entered against Waters Pierce Oil Company; that said suit sets forth that under the contract by which the Pierce Oil Corporation acquired the property and assets of the Waters Pierce Oil Company, the Pierce Oil Corporation assumed all debts, liabilities and obligations of the Waters Pierce Oil Company by its express contract.

IX.

That, thereafter, to wit, on February 18, 1916, the United States of America filed, in the Eastern District of Missouri, a creditor's bill against your petitioners, seeking to recover from them the amount of the judgment and fine of fourteen thousand dollars ($14,000.00) obtained as a result of the indictment and proceedings in the Western District of Louisiana.

X.

That, on March 19, 1917, and subsequent to the filing of said bill in the Eastern District of Missouri, execution was issued out of the United States Court for the Western District of Louisiana, directed to the United States Marshal for the Eastern District of Missouri, and on March 28, 1917, said Marshal made a *nulla bona* return on said execution and filed the said writ and return in the office of the Clerk of the United States District Court for the Western District of Louisiana on March 31, 1917.

XI.

That, thereafter, to wit, on August 23, 1917, the United States of America filed its amended bill, which was in all respects similar to its original bill, except that it set up the issuance of execution from the Western District of Louisiana to the Marshal of the Eastern District of Missouri and the *nulla bona* return thereon.

XII.

That your petitioners duly filed their motion to dismiss said amended bill, which was in all things overruled, and thereafter, on March 11, 1918, the cause coming on to be heard before Honorable David P. Dyer, District Judge for the Eastern District of

Missouri, and upon an agreed statement of facts filed therein and setting out the facts heretofore stated by your petitioners, the Court filed its decision, to the following effect: That complainant have and recover of Clay Arthur Pierce, Henry Clay Pierce and Pierce Investment Trust Company the sum of fourteen thousand dollars ($14,000.00), with interest thereon at 6 per cent from January 29, 1907, for which complainant was awarded execution as at law.

XIII.

That on March 22, 1918, your petitioners duly presented their petition for an appeal to the United States Circuit Court of Appeals, for the Eighth Circuit, and that said petition was on that date allowed and the record of the proceedings in the cause duly filed in the office of the Clerk of the United States Court for the Eighth Circuit.

XIV.

That thereafter the said appeal came on to be heard, and was argued by counsel before Circuit Judges Hook and Stone and District Judge Wade; that said Circuit Court of Appeals, on the 28th day of April, 1919, entered a decree affirming the judgment of the District Court in all things, Judge Wade dissenting from the opinion of the Court.

XV.

That thereafter, and within the time allowed by rule, your petitioners presented their motion for a rehearing, which was on the 15th day of July, 1919, overruled by the Circuit Court of Appeals, Judge Wade adhering to his dissent.

XVI.

That on August 6, 1919, your petitioners duly filed their petition for appeal to the Supreme Court of the United States, and that the same was thereupon allowed, and a transcript of the record was thereupon filed in said court.

XVII.

The questions and propositions of law involved in this case are substantially as follows:

1. Is a judgment for a fine for the violation of a penal statute of the United States a debt that will support a creditor's bill by the United States against the stockholders of the corporation fined, the corporation having theretofore distributed its assets among the stockholders?

2. If such a fine is a debt that will support a creditor's bill, can the United States recover in such a creditor's bill where the distribution of assets to the stockholders was made prior to the trial of the cor-

poration for a violation of the criminal law, and prior to the judgment imposing a fine; *i. e.*, would not the fact that the United States became a creditor subsequent to such distribution preclude its right to maintain the bill?

3. If a corporation sells all of its assets to another corporation, which assumes all the former debts, obligations and liabilities, and the Government thereupon files suit on such covenant of assumption to hold the last-named corporation liable for a fine adjudged against the former, can it subsequently file a creditor's bill to recover the same adjudged fine from the stockholders of the first-named corporation; *i. e.*, is not the Government barred by election of remedies, estoppel or novation?

4. Is the United States of America entitled, under a creditor's bill, to recover a fine adjudged against a corporation, to receive interest upon the amount so adjudged from the date of the indictment and prior to the date of conviction?

5. Is the United States entitled to recover interest upon a judgment for a fine for a violation of its penal laws?

6. Can a judgment for a fine be recovered from one not a defendant in the criminal proceedings, through and by means of a bill in equity?

All of said questions were duly raised and argued by counsel for your petitioners in the District Court and in the Circuit Court of Appeals.

## XVIII.

Your petitioners respectfully submit that a writ of *certiorari* should be allowed herein for the following reasons, among others:

1. Because the questions of law here involved have not been passed upon by this Court or by any Federal Court.

2. Because the public interest and the interest of jurisprudence require the decision of this Court upon the questions of law here involved.

3. Because petitioners feel aggrieved by the decision of said Circuit Court of Appeals for the Eighth Court, in the matters and things aforesaid.

Wherefore, your petitioners respectfully pray that the writ of *certiorari* may be issued out of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record of proceedings in the said Circuit Court of Appeals, in the cause entitled: Clay Arthur Pierce, Henry Clay Pierce, Pierce Investment Trust Company, Appellants, v. United States of America, Appellee, No. 5,145, and to the end that said cause may be reviewed and determined by this Court, and the judgment of said Circuit Court of Appeals and of the

District Court be in all things reversed, and for such proceedings therein as to this Honorable Court may seem just and proper.

HENRY CLAY PIERCE and
PIERCE INVESTMENT TRUST COMPANY,

By S. W. FORDYCE, JR.,
THOMAS W. WHITE,
LEVI COOKE,

*Their Solicitors.*

CLAY ARTHUR PIERCE,

By H. S. PRIEST,
ALBERT D. NORTONI,

*His Solicitor.*

State of Missouri, } ss.
City of St. Louis. }

Thomas W. White, being duly sworn, says that he is one of the counsel for petitioners in the foregoing petition for a writ of *certiorari*, and that he has read the foregoing petition, and the same is true to his

own knowledge, and that his knowledge is derived from the record in this case.

THOMAS W. WHITE.

Subscribed to before me this 22nd day of August, 1919.

My commission expires April 9, 1923.

WALTER R. MAYNE,
Notary Public.

State of Missouri, }
City of St. Louis. } ss.

I hereby certify that I have examined the foregoing petition, and it is my opinion that the petition is well founded and that the case is one in which the prayer of the petitioners should be granted by this Court.

THOMAS W. WHITE,
*Of Counsel for Petitioners.*

# BRIEF OF PETITIONERS

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

| | |
|---|---|
| In the Matter of the Petition of CLAY ARTHUR PIERCE, HENRY CLAY PIERCE and PIERCE INVESTMENT TRUST COMPANY, *Petitioners,* vs. UNITED STATES OF AMERICA, *Respondent.* | Petition for Writ of Certiorari. |

## BRIEF OF PETITIONERS.

I.

A creditor's bill can be brought only for the collection of debts. It can not be used as ancillary to a criminal prosecution. A judgment imposing a fine does not create a debt, nor does the Government become a judgment creditor. Such a judgment is personal and directed against the defendant himself. It

can not be collected against heirs, executors or assigns, nor can it be collected against stockholders of a corporation.

Chicago v. Morell, 274 Ill. 383;
Peterson v. State, 79 Neb. 132;
Hall v. Coleman, 138 Ga. 734;
Spaulding v. State *ex rel.* Backus, 45 U. S. 21, *l. c.* 24;
*In re* Southern Steel Co., 183 Fed. 498;
State v. Morgan, 141 N. C. 726;
Henley v. Myers, 76 Kan. 723;
State v. Streen, 14 Tex. 396, *l. c.* 398;
People v. Ry., 129 Calif. 545, 79 Am. St. R. 137;
*In re* McDonald, 4 Wyo. 150;
McCool v. State, 23 Ind. 127, *l. c.* 132;
*Ex parte* Roberts, 27 Tex. App. 628, 11 Am. St. R. 207;
*In re* Southerland, 23 Fed. Cas. 456, *l. c.* 457;
Spaulding v. People, 7 Hill 301;
Spaulding v. N. Y., 45 U. S. 21;
Whiteacre v. Rector (Va.), 26 Am. R. 420.

II.

A fine imposed as a punishment for crime can, because of its nature, be enforced only against the person convicted of the crime.

U. S. v. Thuerer, 213 Fed. 964;
Wisconsin v. Pelican Insurance Co., 127 U. S. 265;
Hunting v. Attrill, 146 U. S. 657;
Black on Judgments, Sec. 870;
Dyar v. U. S., 186 Fed. 614;
U. S. v. Mitchell, 163 Fed. 1014, and 173 Fed. 254;

*In re* Greene, 52 Fed. 104;
U. S. v. Wood, 154 Fed. 405;
Union Pacific Coal Co. v. U. S. 173, Fed 737, *l. c.* 739;
N. Y. Central R. R. Co. v. U. S., 212 U. S. 481.

III.

A judgment assessing a fine does not convert the criminal responsibility of the defendant into a debt. This is true whether the form or action be by indictment, information, or civil suit, nor does the Government become a creditor. If there is no debtor there can be no creditor.

Adams v. Woods, 2 Cranch. 336;
Nicolin v. Weiland, 55 Minn. 130;
Woolverton v. Taylor, 43 Ill. App 424, *l. c.* 426, 132 Ill. 197;
Moler v. Minnesota Elevator Co., 40 Minn. 343.

IV.

The conviction was obtained on March 20th, 1914. The transfer by Waters Pierce Oil Company to the Pierce Oil Corporation took place on July 9th, 1913. If a debt was created by the conviction, it was not created until that day; hence, since the transfer took place previous to the conviction, the United States would be a subsequent creditor, if a creditor at all, and, therefore, would not be entitled to maintain a creditor's bill.

Graham v. Railroad, 102 U. S. 148, 26 L. Ed. 106.

V.

The statutes of the United States prescribe the method for collecting fines and the Government is restricted to the methods prescribed.

R. S. U. S., Sec. 1041;
*Ex parte* Watkins, 7 Peters 568;
Fischer v. Hayes, 6 Fed. 63;
*Ex parte* Barclay, 153 Fed. 669;
U. S. v. Union Supply Co., 215 U. S. 50;
Jones v. U. S., 137 U. S. 202;
U. S. v. Britton, 108 U. S. 199, *l. c.* 206;
U. S. v. Hudson & Goodwin, 7 Cranch. 32;
U. S. v. Eaton, 144 U. S. 677, *l. c.* 687;
Manchester v. Mass. 139 U. S. 240, *l. c.* 262;
U. S. v. Hall, 98 U. S. 343, *l. c.* 345;
U. S. v. Ortega, 11 Wheat. 468;
U. S. v. Martin, 176 Fed. 110, *l. c.* 112;
U. S. v. Grimaud, 170 Fed. 205;
U. S. v. Boyer, 85 Fed. 425, *l. c.* 436;
Hudson v. Wood, 119 Fed. 764;
Bucyrus Co. v. McArthur, 219 Fed. 266.

VI.

It is admitted that the appellants acted in good faith. There is no fraud suggested in the record. In case of a fraudulent dissolution of a corporation, however, the statutes provide for the punishment of the persons guilty of the fraud.

35 Statutes at Large, Section 1096;
U. S. Penal Code, Sec. 37.

The statutory remedies are exclusive and a creditor's bill cannot be used in aid of a criminal prosecution.

Yates v. Seitz, 7 D. C. 11, *l. c.* 27;
Hunnecke v. Dold, 7 N. M. 5;
Moore v. Baker, 34 Fed. 1, *l. c.* 3;
Bank v. Belk, 94 N. W. 617, *l. c.* 618;
Gould v. Torrance, 19 How. Pr. 360;
Feldenheimer v. Tressel, 6 Dakota 265;
Cunningham v. Cleveland, 98 Fed. 657, *l. c.* 665.

VII.

The judgment was unconstitutional as an attempt to punish appellants for the acts of a corporation without an indictment against the appellants and without a trial by jury in violation of the Sixth Amendment to the Constitution of the United States. The judgment was also a violation of the Fifth Amendment to the Constitution of the United States in that it deprived appellants of property without due process of law.

*In re* Nielsen, 131 U. S. 176;
*In re* Bonner, 151 U. S. 242;
And cases cited under Point II, *supra*.

VIII.

The funds and assets of the Waters Pierce Oil Company which were distributed to the stockholders did not constitute a trust fund for the benefit of creditors and could not be followed by the Government into the

hands of such stockholders nor could the Government obtain a general judgment against the stockholders on account of the receipt by them of such funds and assets.

Coleman v. Hagey, 252 Mo. 102, *l. c.* 136;
Hageman v. R. R., 202 Mo., *l. c.* 264;
Hollins v. Brierfield Co., 150 U. S., *l. c.* 385;
Graham v. R. R., 102 U. S. 148;
Wabash, Etc., Co. v. Ham, 114 U. S. 587, *l. c.* 594;
Savings Bank v. Ritchie, 121 Fed. 956, *l. c.* 959;
Lawrence v. Greenup, 97 Fed. 906;
Am. Ex. Bank v. Ward, 111 Fed. 782.

## IX.

The Government has a plain, adequate and complete remedy at law and therefore can not maintain the present bill.

Judicial Code, Section 263, R. S. U. S. 723;
Rees v. Watertown, 19 Wall. 107;
Thompson v. Allen County, 115 U. S. 550;
Baltimore Safe Deposit Co. v. Anniston, 96 Fed. 663;
Grading Dist. v. Hagedorn, 186 Fed. 451.

## X.

The Government is barred and estopped by its election of remedies, having brought suit against the Pierce Oil Corporation before filing the present bill.

Friedenwald Co. v. Ashville Tobacco Works, 117 N. C. 544;
15 Cyc., 259 and 262.

XI.

The bill was prematurely brought. There had been no judgment obtained against the Waters Pierce Oil Company in Missouri and no return of execution *nulla bona* in Missouri prior to the filing of the bill.

12 Cyc, 25;
Wae v. Delahaye, 95 Iowa 667;
Bank v. McCormick, 44 Atl. 706;
National Tube Works Co. v. Ballou, 146 U. S. 517;
Walser v. Seligman, 13 Fed. 415;
Taylor v. Bowker, 111 U. S. 110;
McElmoyle v. Cohen, 38 U. S. 312.

XII.

The execution issued by the District Court of the Western District of Louisiana addressed to the Marshal of the Eastern District of Missouri was void.

R. S. U. S., Sec. 986;
R. S. U. S., Sec. 1041;
*Re* Wood, 210 U. S. 246, *l. c.* 260;
Toland v. Sprague, 12 Peters 300, *l. c.* 328;
Allen v. Clark, 126 Fed. 738.

XIII.

The decree of the District Court below awarding interest at 6 per cent from January 29th, 1907, being the day of the indictment, was affirmed by the Circuit

Court of Appeals, Eighth Circuit. This was manifest error.

United States v. Jacob Schmidt Brew. Co., 254 Fed. 714;
State v. Streen, 14 Tex. 396, 398;
People v. Railway, 129 Cal. 545, 79 Am. St. Rep. 137.

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Most of the questions of law involved have not been passed upon by this Court or by any Federal Court. It is to the interest of the public and jurisprudence that these questions should be settled for the above reasons and for the further reason that the petitioners feel aggrieved by the decision of the Circuit Court of Appeals, Eighth Circuit, in the matters and things aforesaid. We respectfully submit that the writ prayed for should be issued.

Respectfully submitted,

THOMAS W. WHITE,
LEVI COOKE,
*Counsel for Petitioners.*

S. W. FORDYCE, JR.,
JOHN H. HOLLIDAY,
ALBERT D. NORTONI,
*Of Counsel.*

St. Louis, September 22, 1919.

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# Supreme Court of the United States

OCTOBER TERM—1920.

No. 173.

CLAY ARTHUR PIERCE, HENRY CLAY PIERCE and PIERCE INVESTMENT COMPANY,

Appellants,

against

THE UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## APPELLANTS' POINTS.

LOUIS MARSHALL,
of Counsel.

PRESS OF FREMONT PATEK, 80 Washington Street, New York City.

## SUBJECT INDEX.


| | PAGE |
|---|---|
| Statement | 1-6 |
| Assignments of Error | 6-9 |
| Argument | |
| Point I. The judgment imposing a fine on the Waters Pierce Oil Co. on its conviction under the Elkins Act, did not constitute a debt on which a creditor's bill would lie in favor of the United States against the appellants | 9-15 |
| Point II. The contention that a judgment imposing a fine for an offense against the laws of the United States is enforceable by creditor's bill, because of Section 1041 of the United States Revised Statutes cannot be sustained | 16-26 |
| Point III. The transfer by the Waters Pierce Oil Company of its property to the Pierce Oil Corporation having been made in good faith nearly a year prior to the imposition of the fine, even were the trust fund theory otherwise applicable, it does not inure to the benefit of one not a creditor at the time of the transfer and distribution of the corporate property | 27-32 |

PAGE

Point IV. The Creditor's bill in this case was prematurely brought because at the date of its filing no execution had been issued or returned nulla bona against the Waters Pierce Oil Co. in Missouri ..... 33

Point V. At the time when this suit was brought the Government had instituted a suit in the Western District of Louisiana against the Pierce Oil Corporation for the recovery of the amount of the fine imposed on the Waters Pierce Oil Co., based on the assumption of all of the debts obligations and liabilities of the Waters Pierce Oil Co. The bringing of such suit constituted an irrevocable election of remedies ..... 34-36

Point VI. It was plain error for the Courts below to award judgment against the appellants not only for the amount of the fine but for interest thereon from the date of the indictment, more than seven years anterior to the conviction and sentence of the Waters Pierce Oil Co. ..... 36-43

## CASES AND AUTHORITIES CITED.

PAGE

Acer vs. Hotchkiss (97 N. Y., 395) ..... 35
Allen vs. Clark (126 Fed. Rep., 738) ..... 19
Audubon vs. Shufeldt (181 U. S., 575) ..... 14
Bach vs. Tuch (126 N. Y., 53) ..... 35
Bailey vs. State (87 Ala., 44; 6 S. Rep., 398, 399) ..... 12
Baltimore R. R. Co. vs. Grant (98 U. S., 403) 19
Blanche Page, The (16 Blatchf, 1) ..... 22
Bank vs. McCormick (44 Atl. Rep., 706) .... 33
Behn vs. Campbell (205 U. S., 403) ..... 42
Board vs. Zackary (6 Pet., 635) ..... 22
Boston Trust Co. vs. Merchants Tel. Co. (36 Fed. Rep., 297) ..... 31
Boyd, Ex Parte (105 U. S., 647) ..... 25
Boyd, In re (34 Kan., 540; 9 Pac. Rep., 240) 12
Briscoe vs. Rudolph (221 U. S., 547) ..... 42
Brown vs. U. S. (6 Ct. Cl., 171, 178) ..... 19
Central Imp. Co. vs. Cambria Steel Co. (201 Fed. Rep., 811) ..... 43
Chase vs. Curtis (113 U. S., 452) ..... 13
Chase vs. Ingalls (97 Mass., 524, 530) ..... 14
Chicago vs. Morell (247 Ill., 383) ..... 13
Child vs. Boston & Fairhaven Iron Works (137 Mass., 516, 519) ..... 13
City of Boston vs. Turner (201 Mass., 190, 193) .....14, 15
Clark vs. Allen (114 Fed. Rep., 374, affd. 126 Fed. Rep., 738) .....14, 22
Coe vs. East & West Ry. Co. (52 Fed. Rep., 534) ..... 31
Coleman vs. Hagey (252 Mo., 102, 135) ..... 31
Columbia Heights Realty Co. vs. Rudolph (217 U. S., 547) ..... 42

PAGE

Conrow vs. Little (115 N. Y., 387) ..... 35
Davidson, In re (21 Cal. App., 118; 131 Pac. Rep., 67) ..... 43
Dearfield vs. Nimms (110 Mass., 115) ..... 32
Dunbar vs. Dunbar (190 U. S., 340) ..... 14
Dyer vs. U. S. (186 Fed. Rep., 623) ..... 37
Esmond vs. Bullard (16 Hun, 65, 68) ..... 13
Fickel vs. Granger (83 Ohio, 101; 32 L. R. A., U. S., 270) ..... 14
Fogg vs. Blair (133 U. S., 534, 541) ..... 30
Fowler vs. Bowery Sav. Bk. (113 N. Y., 450) 35
Friedenwald Co. vs. Asheville Tobacco Works (117 N. C., 544) ..... 34
Gaylord vs. Kelshaw (1 Wall., 81, 82) ..... 32
Graham vs. Railroad Co. (102 U. S., 148) .27, 29
Greene, In re (52 Fed. Rep., 104) ..... 21
Hagerman vs. Moran (75 Fed. Rep., 97) .... 40
Hall vs. Coleman (138 Ga., 734; 75 S. E., Rep. 1132) ..... 12
Heacock vs. Sherman (14 Wend., 58) ..... 13
Henley vs. Meyers (76 Kan., 723) ..... 13
Herbert vs. Handy (29 R. I., 543; 72 Atl. Rep., 1102, 1104) ..... 15
Hollins vs. Brierfield Coal & Iron Co. (150 U. S., 371, 383, 385) ..... 29
Hollman, Ex parte (79 S. C., 69; 21 L. R. A., U. S., 242) ..... 12
Horbach vs. Hill (112 U. S., 144, 149) ....28, 30
Hudson vs. Wood (119 Fed. Rep., 764) ..... 23
Jones vs. U. S. (137 U. S., 211) ..... 21
Kelly vs. Vincent (8 Ohio St., 415, 420) .... 19
Kirland vs. Kille (99 N. Y., 390, 395) ..... 13
Labette County Commrs. vs. U. S. (112 U. S., 217) ..... 18

PAGE

Lane vs. Oregon (7 Wall., 71) ..... 14
Lant vs. Manley (71 Fed. Rep., 18) ..... 30
Lind vs. Lind (64 N. J. Eq., 736) ..... 14
Long, In re (L. R., 20, Q. B., 316, 318) ..... 12
McCool vs. State (23 Ind., 127, 131, 132) ....12, 13
McDonald vs. Dewey (202 U. S., 529) ..... 30
McDonald, In re (4 Wyo., 150; 33 Pac. Rep., 18, 20) .....12, 13
McDonald vs. Williams (174 U. S., 397) .... 30
McInnis, Ex parte (93 Miss., 773; 54 S. Rep., 260, 261) ..... 12
Manchester vs. Mass. (139 U. S., 240, 262, 267) ..... 21
Merchants Bank vs. Thomas (121 Fed. Rep.) 30
Merriweather vs. Garrett (102 U. S., 472, 513) 14
Mershon vs. Morris (148 N. C., 48; 61 S. E. Rep., 647) ..... 43
Moler vs. Minnesota Elevator Co. (40 Minn., 343) ..... 15
Moller vs. Tuska (87 N. Y., 166) ..... 35
Montgomery vs. Whitehead (40 Col., 327; 11 L. R. A., U. S., 230) ..... 30
Morris vs. Rexford (18 N. Y., 352) ..... 35
National Tube Works vs. Ballon (146 U. S., 517) ..... 33
New Jersey vs. Anderson (203 U. S., 483, 492) 14
Nicolin vs. Weiland (55 Minn., 130; S. C., 56 N. W. Rep., 587) ..... 15
People vs. Cicotte (15 Mich., 336, 338) ..... 19
People ex rel. Warfield vs. Sutter St. Ry. Co. (129 Cal., 545, 62 Pac. Rep., 104) ..... 37
Perkins vs. Fourniquet (14 How., 328) ..... 40
Perry vs. Orr (35 N. J. Law, 295) ..... 13
Peterson vs. State (79 Neb., 132; 14 L. R. A., U. S., 292) .....12, 13

PAGE

Railroad Co. vs. Hart (114 U. S., 654) ..... 25
Rawson vs. Turner (4 Johns., 469) ..... 36
Robertson, Ex parte (27 Tex. App., 628) .... 13
Romaine vs. Chauncey (129 N. Y., 566) .... 14
Santaella & Co., A. vs. Otto F. Lange Co. (155 Fed. Rep., 719) ..... 43
Savage vs. Shaw (195 Mass., 571; 81 N. E. Rep., 303) ..... 13
Savings Bank vs. Ritchie (121 Fed. Rep., 956, 959) ..... 31
Scarf vs. Jardine (L. R., 7, App. Cases 345) 36
Schreyer vs. Scott (134 U. S., 409, 410) .... 30
Southern Steel Co., In re (183 Fed. Rep., 498) 14
Spalding vs. People (7 Hill [N. Y.] 301; affd. 4 How., 21, 24) .....12, 14
State vs. Joseph (137 La., 52, 55; 68 S. Rep., 211) ..... 12
State vs. Mace (5 Md., 337, 350) ..... 12
State vs. Steen (14 Tex., 396, 398) ..... 38
Sutherland, In re (23 Fed. Cas. No. 13, 639) 12
Sutherland, In re (23 Fed. Cas., 456, 457)... 14
Swan Land & Cattle Co. vs. Frank (148 U. S., 603) .....31, 32
Terry vs. Munger (121 N. Y., 161) ..... 35
Teuscher, In re (23 Fed. Cas., page 867)..... 16
Tillson vs. U. S. (100 U. S., 46) ..... 19
Toledo R. R. Co. vs. Continental Tr. Co. (95 Fed. Rep., 519, 528) ..... 31
Turner vs. Turner (108 Fed. Rep., 785) .... 14
U. S. vs. Britton (108 U. S., 199, 206) ..... 21
U. S. vs. Eaton (144 U. S., 677, 687) ..... 21
U. S. vs. First Natl. Bank (234 U. S., 262) .. 19
U. S. vs. Hudson (7 Cranch, 32) ..... 21
U. S. vs. Jacob Schmidt Brg. Co. (254 Fed. Rep., 714) ..... 38

PAGE

U. S. vs. Mitchell (163 Fed. Rep., 1014; affd. sub. nom., U. S. vs. Dunne, 173 Fed. Rep., 254) ..... 37
U. S. vs. Pena (175 U. S., 500) ..... 42
U. S. vs. Pomeroy (152 Fed. Rep., 279) .... 37
U. S. vs. Theurer (213 Fed. Rep., 964) ..... 37
U. S. vs. Verdier (164 U. S., 218) ..... 40
Wabash, St. Louis & Pac. Ry. vs. Ham (114 U. S., 587) ..... 30
Wae vs. Delahaye (95 Iowa, 667) ..... 33
Wallace vs. Penfield (106 U. S., 260, 262) .... 30
Watkins, Ex parte (7 Pet. 568, 574) ..... 18
Ware vs. Hylton (3 Dallas, 249, 278) ..... 15
Weems vs. U. S. (217 U. S., 349)..... 42
Wetmore vs. Wetmore (196 U. S., 68) ..... 14
Whalen vs. Stuart (194 N. Y., 505) ..... 35
Whiteacre vs. Rector (29 Gratt [Va.], 714) 14
Whitney vs. Kelly (94 Cal., 148, 49) ..... 31
Windsor vs. McVeigh (93 U. S., 274, 282) .. 26
Woolverton vs. Taylor (43 Ill. App., 424, 426) 15
World's Columbian Exposition vs. Republic of France (91 Fed. Rep., 64) ..... 42

## STATUTES AND DIGESTS.

Act to further Administration of Justice (17 St. L., 197, 198) ..... 22
Cyc. (Vol. 12, page 25) ..... 33
Elkins Act of Feb. 19, 1903 (Ch. 708, Sec. 2, Statutes 847) ..... 9
Federal Statutes Annotated (2nd Ed., Vol. 1, pages 41, 42) ..... 19
U. S. Revised Statutes (Sec. 916) ..... 21
U. S. Revised Statutes (Sec. 966) .....39, 41
U. S. Revised Statutes (Sec. 1041) ..... 16

# Supreme Court of the United States

OCTOBER TERM, 1920.

No. 173.

| | |
|---|---|
| CLAY ARTHUR PIERCE, HENRY CLAY PIERCE and PIERCE INVESTMENT COMPANY, Appellants, against THE UNITED STATES OF AMERICA. | Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. |

## APPELLANTS' POINTS.

This action was brought as a creditor's suit against the appellants, the Waters Pierce Oil Company, and Henry S. Priest and Clay Arthur Pierce, as trustees, for a decree charging them with liability to the extent of $14,000, the amount of a fine imposed on the Waters Pierce Oil Company on its conviction for receiving certain rebates and concessions in violation of the Elkins Act of February 19, 1903 (*Rec.*, pages 16-21).

The facts were stipulated (*Rec.*, page 30), and are as follows: The Waters Pierce Oil Company was a Missouri corporation, having its principal place of business at St. Louis, Mo. On January 29, 1907, an indictment was returned and filed against

it in the District Court of the United States for the Western District of Louisiana under the Elkins Act. The indictment was not tried until March, 1914. On the trial that then took place the corporation was adjudged guilty and it was fined $14,000 and costs. A writ of error without supersedeas was allowed to the United States Circuit Court of Appeals for the Fifth Circuit, and that Court on June 23, 1915, affirmed the judgment (*Rec.*, page 30). An execution on the judgment was issued out of the District Court for the Western District of Louisiana, and the United States Marshal for that district on August 2, 1915, made a return of *nulla bona*. The corporation furnished a bond in connection with the writ of error for the costs of the prosecution and on affirmance the surety paid the costs (*Rec.*, pages 17-31). The fine of $14,000 was not paid.

On July 9, 1913, nearly nine months before the trial of the indictment and more than six years after the indictment had been filed, the Waters Pierce Oil Company, pursuant to a request of the holders of more than four-fifths of the capital stock of the corporation, authorized the sale of all of its property to the Pierce Oil Corporation, organized under the laws of Virginia, for $10,500,000 of the common capital stock of the latter corporation and $5,000,000 in cash. Henry S. Priest and Clay Arthur Pierce were appointed by the Board of Directors as agents and trustees of the Waters Pierce Oil Company to receive from the Pierce Oil Corporation this consideration (*Rec.*, page 31). Pursuant to the action thus taken the property of the Waters Pierce Oil Company was on July 7, 1913, conveyed to the Pierce Oil Corporation, and Henry

S. Priest and Clay Arthur Pierce received from the Pierce Oil Corporation the consideration payable for such transfer to the Waters Pierce Oil Company (*Rec.*, page 32), and distributed it pro rata to the several stockholders of the Waters Pierce Oil Company. Henry Clay Pierce received upwards of $3,400,000 in cash and $7,158,375 par value of the stock of the Pierce Oil Corporation, the Pierce Investment Company $1,250,000 in cash and $2,625,000 in stock of the Pierce Oil Corporation, and Clay Arthur Pierce $1,250 in cash and $2,625 in stock of the Pierce Oil Corporation (*Rec.*, pages 32, 33).

After the commencement of this action and on March 19, 1917, an execution was issued out of the United States District Court for the Western District of Louisiana against the Waters Pierce Oil Company, directed to the United States Marshal for the Eastern District of Missouri, and on March 28, 1917, the latter made a return of *nulla bona* on the execution so issued and filed the writ and return in the office of the Clerk of the United States District Court for the Western District of Louisiana on March 31, 1917 (*Rec.*, page 33).

The Waters Pierce Oil Company has no assets out of which judgment can be collected, the transfer to the Pierce Oil Corporation covering all of its assets and property. It has ceased to do business and is no longer a going concern. Henry S. Priest and Clay Arthur Pierce, as trustees of the Waters Pierce Oil Company, prior to the filing of this suit distributed to the stockholders of the Waters Pierce Oil Company all of the money and stocks received by them as trustees from the Pierce Oil Corporation (*Rec.*, page 33).

On February 4, 1916, which was prior to the commencement of this suit, the appellee filed in the District Court of the United States for the Western District of Louisiana a bill of complaint against the Pierce Oil Corporation, in which it sought to enforce against the latter the fine imposed on the Waters Pierce Oil Company and to have it decreed to be a lien upon the property in Louisiana described in the bill of complaint which had been sold and transferred by the Waters Pierce Oil Company to the Pierce Oil Corporation, it being alleged that as a part of the consideration of the transfer by the Waters Pierce Oil Company to it of its property the Pierce Oil Corporation was to assume the payment of all the debts, liabilities and obligations of the Waters Pierce Oil Company (*Rec.*, pages 33, 34, 37-45).

The resolution pursuant to which the transfer was made and the condition on which the stockholders of the Waters Pierce Oil Company consented to the transfer expressly provided that, in addition to the payment of the common stock of the Pierce Oil Corporation and the $5,000,000 in cash, "the assumption by said Pierce Oil Corporation of all the debts, obligations and liabilities of the Waters Pierce Oil Company" was to be a part of the consideration (*Rec.*, pages 35-37).

On the trial of this cause before the Honorable David P. Dyer, Judge of the United States District Court for the Eastern District of Missouri, it was decreed (*Rec.*, page 51), that the judgment obtained by the United States in the criminal proceeding for the sum of $14,000 was a valid and subsisting judgment against the Waters Pierce Oil Company and that "the defendant had divested it-

self of all of its property and had no assets subject to execution under the judgment," that the amounts received by the appellants as the proceeds of their respective holdings in the stock of the Waters Pierce Oil Company were subjected in equity to the payment of the judgment obtained by the United States" against the Waters Pierce Oil Company, and that the appellee should recover from the defendants Henry Clay Pierce, Pierce Investment Trust Company and Clay Arthur Pierce (as an individual) in satisfaction of the judgment obtained as aforesaid in the Western District of Louisiana the sum of $14,000 *with interest at six per cent. thereon from January 29, 1907*, save that as against the defendant Clay Arthur Pierce (as an individual) this judgment is limited to the amount of money so received by him as stockholder-beneficiary aforesaid, namely, $1250.

It was further decreed (*Rec.*, page 51):

> "That the defendant the Waters Pierce Oil Company, a corporation, having divested itself of all its property, and that the defendants Henry S. Priest and Clay Arthur Pierce (as trustees, etc.), having divested themselves of the money, stock, property and effects received of the money, stock, property and effects received by them as trustees and agents of the said The Waters Pierce Oil Company, a corporation, by disbursing the same to the holders of stock in said Waters Pierce Oil Company, a corporation, as beneficiaries—are dismissed from the cause without day."

An appeal was taken from this decree to the United States Circuit Court of Appeals for the

Eighth Circuit, assignments of error being filed as set forth at *Record* pages 52-55. That Court, consisting of Circuit Judges Hook and Stone and District Judge Wade, affirmed the decree, Judge Wade dissenting (*Rec.*, pages 60-64), 257 *Fed. Rep.*, 514. A petition for a rehearing having been filed (*Rec.*, pages 65-71) the petition was denied by a similarly divided court (*Rec.*, pages 72, 260 *Fed. Rep.*, 158).

A writ of error was thereupon allowed to this court, the following assignments of error having been filed (*Rec.*, pages 73-75):

## ASSIGNMENTS OF ERROR.

1. That the Court of Appeals erred in refusing to hold that the District Court erred in refusing to dismiss the first amended bill and in overruling appellants' separate motions to that end, for the reason that:

(a) Said amended bill does not state a cause of action cognizable in equity.

(b) Said amended bill is multifarious, in that it sets forth separate and distinct claims or causes of action against separate defendants.

(c) That there is a misjoinder of parties defendant in that stockholders are joined with trustees for a corporation and the alleged claim or cause of action does not affect them in the same capacity or affect the same res.

(d) Said amended bill shows upon its face that complainant therein has a plain, adequate and complete remedy at law.

(e) It appears from said bill that necessary parties defendant, to wit: the remaining stockholders of the Water Pierce Oil Company are not joined as defendants therein.

II. The Court of Appeals erred in failing and refusing to hold that the action of the District Court in compelling appellants to answer to the bill and in awarding a decree against appellants deprived them of rights guaranteed by the Fifth Amendmant to the Constitution of the United States, in that appellants were compelled to answer for an infamous crime without presentment or indictment of grand jury, and were compelled to be witnesses against themselves in a criminal case, and were thus deprived of their property without due process of law.

III. The Court of Appeals erred in failing and refusing to hold that the action of the District Court deprived appellants of a trial by jury in an action for the recovery of a fine under a penal statute, contrary to the provisions of the Sixth Amendment to the Constitution of the United States.

IV. That the allegations of the bill charged defendants with a conspiracy to defraud the United States, in violation of Section 37 of the Penal Code, and that by compelling defendants to answer said bill they have been compelled to be witnesses against themselves and are deprived of a jury trial, in violation of the provisions of the Sixth Amendment to the Constitution of the United States, and the Court of Appeals erred in failing and refusing so to hold.

V. The Court of Appeals erred in failing and refusing to hold that the filing of the suit on February 4th, 1916, by the United States of America against the Pierce Oil Corporation, filed within the Western District of Louisiana upon the same cause of action set forth in the bill herein, constituted an election of remedies, and in failing and refusing to hold that such election barred the maintenance of the present suit.

VI. The Court of Appeals erred in failing and refusing to hold that the filing of a suit by the United States on February 4th, 1916, in the Western District of Louisiana, against the Pierce Oil Corporation, constituted and acceptance of the offer contained in the contract between the Waters Pierce Oil Company and the Pierce Oil Corporation, in which the latter assumed the debts and obligations of the former, and in failing and refusing to hold that the filing of such suit constituted a novation and released the Waters Pierce Oil Company.

VII. The Court of Appeals erred in failing and refusing to hold that under the agreed statement of facts the plaintiff had a plain, adequate and complete remedy at law.

VIII. The Court of Appeals erred in affirming the decree of the District Court in awarding the United States interest from the date of the indictment within the Western District of Louisiana, to wit: January 29th, 1907, when conviction thereupon was not obtained until March 20th, 1914, and erred in affirming the award of interest upon the judgment obtained on said last named date.

IX. The Court of Appeals erred in holding that the judgment for a fine constituted a debt on which

a creditor's bill would lie and enforceable by such civil remedy in equity.

X. The Court of Appeals erred in failing and refusing to hold that such alleged debt, if a debt at all, was not enforceable in this proceeding, for that such debt, if a debt, constituted the United States a subsequent creditor and it is therefore not entitled to maintain this bill.

XI. The Court of Appeals erred in failing and refusing to hold that the suit was prematurely brought, in that at the time of the filing of the original bill no execution had been issued to the Marshal of the Eastern District of Missouri against the Waters Pierce Oil Company and in that no judgment at law had been secured in the Eastern District of Missouri before the filing of said suit.

XII. The Court of Appeals erred in refusing to grant appellants' petition for rehearing for the reasons therein stated.

## POINTS.

### I.

### The judgment imposing a fine on the Waters Pierce Oil Company on its conviction under the Elkins Act did not constitute a debt on which a creditor's bill would lie in favor of the United States against the appellants.

The statute creating the crime of which the corporation was convicted (Act of February 19, 1903, ch. 708, Section 2, Statutes, 847) declares:

"And it shall be unlawful for any person, persons, or *corporation* to offer, grant, or give or *to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier* subject to said Act to regulate commerce and the Acts amendatory thereto, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or *corporation who shall* offer, grant, or give or solicit, *accept or receive any such rebate, concession or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. In all convictions occurring after the passage of this Act for offenses under said Acts to regulate commerce,* whether committed before or after the passage of this Act, or for offenses under this section, *no penalty shall be imposed on the convicted party other than the fine prescribed by law; imprisonment wherever now prescribed as part of the penalty being hereby abolished.* Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transporation may have been conducted;

> and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein."

The proceeding in which the judgment of conviction was rendered against Water Pierce Oil Company, was for an infraction of this statute, which was one of the criminal laws of the United States. It was a criminal and in no sense a civil cause. In view of the fact that it was physically impossible to subject the corporation to imprisonment, the statute imposed a fine in lieu of the imprisonment which might have been otherwise provided. By no possibility could the proceeding have been regarded as the enforcement of a civil remedy. It rested upon an indictment. It was tried on the criminal side of the court. No cause of action against the Waters Oil Company either *ex-contractu* or *ex delicto* was pleaded; nor was any obligation, express or implied, sought to be enforced against the corporation in the proceedings that culminated in the sentence imposed. There was, therefore, *ab initio* no debt owing by the corporation to the United States, nor was a debt created in consequence of the infliction of the statutory punishment resulting from the verdict of the jury that pronounced the corporation guilty of the crime charged in the indictment. There being no debt, it necessarily follows that the relation between the Government and the corporation was not that of debtor and creditor, and hence there was no basis for a creditor's bill for the enforcement of the fine imposed.

By the weight of authority a fine inflicted in a criminal proceeding is not a debt.

In *re Sutherland*, 23 Fed. Cas., No. 13, 639;
*Hall* vs. *Coleman*, 138 Ga., 734; 75 S. E. Rep., 1132;
*McCool* vs. *State*, 23 Ind., 127, 132;
*State* vs. *Joseph*, 137 La., 52, 55; 68 S. Rep., 211;
*State* vs. *Mace*, 5 Md., 337, 350;
*Peterson* vs. *State*, 79 Neb., 132; 14 L. R. A., N. S., 292;
*Ex parte Hollman*, 79 S. C., 60; 21 L. R. A., N. S., 242;
*In re McDonald*, 4 Wyo., 150; 33 Pac. Rep., 18, 20.

It has likewise been held that a fine imposed in a civil proceeding to punish a criminal contempt of court is not a debt.

*Spalding* vs. *People*, 7 Hill (N. Y.), 301; affd. 4 How., 21, 24.

Nor are costs in a criminal proceeding a debt.

*State* vs. *Joseph*, 137 La., 52, 55; 68 S. Rep., 211;
*In re Long*, L. R., 20 Q. B., 316, 318;
*Bailey* vs. *State*, 87 Ala., 44; 6 S. Rep., 398, 399;
*In re Boyd*, 34 Kan., 540; 9 Pac. Rep., 240;
*Ex parte McInnis*, 93 Miss., 773; 54 S. Rep., 260, 261;
*McCool* vs. *State*, 23 Ind., 127, 131.

It has also been decided that the term "debt" does not include the obligation arising on account of a tort committed, even where a claim in tort has become liquidated by judgment.

*Chase* vs. *Curtis*, 113 U. S., 452;
*Savage* vs. *Shaw*, 195 Mass., 571; 81 N. E. Rep., 303;
*Child* vs. *Boston & Fairhaven Iron Works*, 137 Mass., 516, 519;
*Perry* vs. *Orr*, 35 N. J. Law, 295;
*Kirkland* vs. *Kille*, 99 N. Y., 390, 395;
*Heacock* vs. *Sherman*, 14 Wend., 58;
*Esmond* vs. *Bullard*, 16 Hun, 65, 68;
*Henley* vs. *Meyers*, 76 Kan., 723.

*Chase* vs. *Curtis*, *supra*, was an action to enforce against the trustees of a corporation a liability for its debts because of their failure to file the reports of capital and of debts required by the statute. The plaintiff's claim against the corporation was in tort. This, it was held, was not a debt which could be made the basis of a liability against the trustees.

A fine is not a debt within the meaning of a constitutional prohibition against imprisonment for debt.

*In re McDonald*, 4 Wyo., 150;
*McCool* vs. *State*, 23 Ind., 127;
*Ex parte Robertson*, 27 Tex. App., 628;
*Peterson* vs. *State*, 79 Neb., 132;
*Chicago* vs. *Morell*, 247 Ill., 383.

It is not a debt provable in bankruptcy, nor is it discharged by bankruptcy.

*Spalding* vs. *People*, 7 Hill, 301, affd. 4 How., 21, 24;
*In re Sutherland*, 23 Fed. Cas., 456, 457;
*In re Southern Steel Co.*, 183 Fed. Rep., 498.

Nor is a fine a "debt contracted" within the meaning of the law exempting homesteads from levy in satisfaction of a debt.

*Whitcacre* vs. *Rector*, 29 Gratt. (Va.), 714;
*Clark* vs. *Allen*, 114 Fed. Rep., 374, affd. 126 Fed. Rep., 738.

By analogy, a judgment for alimony is not a debt.

*Audubon* vs. *Shufeldt*, 181 U. S., 575.
*Dunbar* vs. *Dunbar*, 190 U. S., 340;
*Wetmore* vs. *Wetmore*, 196 U. S., 68;
*Romaine* vs. *Chauncey*, 129 N. Y., 566;
*Turner* vs. *Turner*, 108 Fed. Rep., 785;
*Lind* vs. *Lind*, 64 N. J. Eq., 736;
*Chase* vs. *Ingalls*, 97 Mass., 524, 530;
*Fickel* vs. *Granger*, 83 Ohio, 101; 32 L. R. A., N. S., 270;

Neither are taxes "debts."

*Merriweather* vs. *Garrett*, 102 U. S., 472, 513;
*Lane* vs. *Oregon*, 7 Wall, 71;
*New Jersey* vs. *Anderson*, 203 U. S., 483, 492;
*City of Boston* vs. *Turner*, 201 Mass., 190, 193.

However defined, a "creditor" is the correlative of a "debtor." The term is ordinarily used as the antonym of "debtor" and involves a debt and a credit.

*City of Boston* vs. *Turner*, 201 Mass., 190, 193;
*Herbert* vs. *Handy*, 29 R. I., 543; 72 Atl. Rep., 1102, 1104.

Mr. Justice Patterson, in *Ware* vs. *Hylton*, 3 Dallas, 249 said:

"Creditors must have debtors; 'debtors' is the correlative term."

Mr. Justice Iredell, in *Ware* vs. *Hylton*, 3 Dallas, 278 said:

"There can be no creditor, without two correlatives, a debtor and a debt."

Said the Court in

*Moler* vs. *Minnesota Elevator Co.*, 40 Minn., 343:

"If there is no debtor, there can be no creditor."
"A creditor is universally defined as a person to whom a debt is owing."

*Nicolin* vs. *Weiland*, 55 Minn., 130; s. c., 56 N. W. Rep., 587;
*Woolverton* vs. *Taylor*, 43 Ill. App., 424, 426;

## II.

**The contention that a judgment imposing a fine for an offense against the laws of the United States is enforceable by creditor's bill, because of Section 1041 of the United States Revised Statutes cannot be sustained.**

That section reads as follows:

> "In all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, *may be enforced by execution against the property of the defendant* in like manner as judgments in civil cases are enforced: Provided, That where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid."

Shortly after the enacement of this section it was interpreted in *In re Teuscher*, 23 Fed. Cas., page 867, by Judge Treat, who said:

> "Prior to the act of 1872, in all criminal proceedings, fines and penalties that became part of the sentence were enforced, either by the judgment of the court that the party

should stand imprisoned until the fine or penalty was paid, or omitting that clause, leaving the district attorney to issue his *capias pro fine*. In 1872 Congress passed a very important act, regulating the practice and proceedings of the United States courts. It took occasion in that act, by what is now known as Section 1041 of the Revised Statutes, for the first time to adopt an alternative mode of making good to the government the amount of penalty or fine. By the terms of that provision the fine or penalty might be collected by an execution for the first time in the history of the government. It, of course, was not designed by this act that that should be the exclusive mode, but either one mode or the other might be adopted, to wit: either what is generally known now by the term 'execution' or a capias.

"Now, 'execution,' as used in this act, is what is known by the profession generally, the country over, as *fi. fa.* If nothing had been said in this judgment concerning the mode of enforcing it, then the district attorney, at his election, might have adopted one or the other process; but the court, for reasons satisfactory to itself at the time, imposed what was the minimum punishment under the statute in these particular cases. * * * The court might have ordered these parties to stand committed until their fines were paid. Had it done so they would have been so committed, and then at the expiration of thirty days, under the provisions of Section 1042 of the Revised Statutes, they could have been discharged on showing their pauperism."

A reference to the opinion of Mr. Justice Story in *Ex parte Watkins*, 7 Pet., 568, 574, confirms the accuracy of the explanation of Judge Treat as to the manner in which a fine was enforced prior to 1872:

> "At the common law, whenever a fine and imprisonment constitute a part of the judgment upon a conviction in a criminal case, the judgment, if the party is in court, is that he be committed to jail in execution of the sentence, and until the fine is paid. If he is not then in court, a special writ of *capias pro fine* issues against him; the exigency of which is that his body be taken and committed to jail until the fine is paid."

The statute constitutes a part of the criminal law of the United States, which is wholly statutory. Its language cannot, therefore, be extended so as to include within it what is not expressly set forth. But for the statute it would have been unlawful to enforce a fine by execution. The execution which it permits to be employed for the enforcement of the fine is expressly limited to an *execution* "against the property of the defendant."

The term "execution" has a well-known signification. It is a writ issued upon a judgment that commands the officer to whom it is addressed to levy on goods, chattels, lands and tenements of the judgment debtor and to sell such property in the manner prescribed by law and to apply the proceeds to the payment of the judgment.

*Labette County Commrs.* vs. *United States*, 112 U. S., 217.

*People* vs. *Cicotte*, 15 Mich., 336, 338.
*Brown* vs. *United States*, 6 Ct. Cl., 171, 178.
*Kelly* vs. *Vincent*, 8 Ohio St., 415, 420.

An execution against the property of a defendant does not include the filing of a creditor's bill in an independent suit on the equity side of the court after the remedy by execution has been exhausted. The law-makers have limited the remedy to the issuance of an execution for the seizure of the defendant's property. Had it been intended to confer on the Government the right to proceed in equity for the enforcement of other remedies than that afforded by the writ of execution, it would have been easy to have so provided. The failure to have done so must be regarded as a negation of the power.

*I Federal Statutes Annotated* (2nd ed), pages 41, 42.
*U. S.* vs. *First National Bank*, 234 U. S., 262.
*Baltimore R. R. Co.* vs. *Grant*, 98 U. S., 463.
*Tillson* vs. *U. S.*, 100 U. S., 46.

In this connection it will be interesting to note the application of the principle of Section 1041 in *Allen* vs. *Clark*, 126 Fed. Rep., 738.

In the present case the execution was issued out of the United States District Court for the Western District of Louisiana, directed in the first instance to the United States Marshal of that district. He having returned the execution *nulla bona* a second execution was subsequently issued out of

the same Court directed to the United States Marshal for the Eastern District of Missouri, who likewise returned the execution *nulla bona*. That ended the proceedings in the tribunal in which the judgment against the defendant in the criminal proceedings had been rendered. The executions issued against its property were found to be incapable of enforcement. They had in fact spent their force. They were found inadequate to reach the property of the defendant, because it had none. It was then that this creditor's suit was instituted in the District Court of the United States for the Eastern District of Missouri, a different tribunal from that in which the judgment had been rendered, and the equity jurisdiction of that Court was invoked against other parties. It is impossible by interpretation to bring such a suit as the present within the purview of the phrase "enforced by execution against the property of the defendant," employed in Section 1041.

The incongruity of appellee's contention becomes apparent when one considers that the decree rendered in the present suit expressly eliminates the Waters Pierce Oil Company and, in so many words, dismisses it from the cause, without day, it being adjudged to have "divested itself of all its property" and to have "no assets *subject to execution* under said judgment" obtained against it by the appellee (*Record*, page 51). The Court having thus decreed that the defendant upon whom the fine had been imposed had no property against which an execution could be enforced, decreed judgment against the present appellants and the issuance of execution against *their* property in satisfaction of the judgment rendered in the criminal cause, to which they were not parties, against

the Waters Pierce Oil Company in the United States District Court for the Western District of Louisiana.

Considering this proceedure as an attempt to enforce the criminal law of the United States, that effort must fail because the statute on which it is sought to be predicated contains no grant of power warranting the remedy pursued or the decree rendered, which goes far beyond any authority conferred by any act of Congress. This is a corollary to the propositions that, so far as the United States is concerned, there are no common law offenses, the whole criminal jurisdiction of its courts, including the definition of crimes and the prescription of the punishment to be meted out to an offender and the procedure to be followed in connection therewith, must be found in acts of Congress, which being penal legislation, must be strictly interpreted.

> *Jones* vs. *United States*, 137 U. S., 211;
> *United States* vs. *Hudson*, 7 Cranch., 32;
> *United States* vs. *Britton*, 108 U. S., 199, 206;
> *Manchester* vs. *Massachusetts*, 139 U. S., 240, 262, 267;
> *United States* vs. *Eaton*, 144 U. S., 677, 687;
> *In re Greene*, 52 Fed. Rep., 104.

Nor does *Section* 916 of the *United States Revised Statutes* apply. It reads:

> "The party recovering a judgment *in any common law cause* in any circuit or district court shall be entitled to similar remedies upon the same *by execution or otherwise* to reach

the property of the judgment debtor as are now provided in like causes by the laws of the state in which such court is held or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may from time to time by general rule adopt such state laws as may hereafter be in force in such state in relation to remedies *upon a judgment as aforesaid by execution or otherwise.*"

This section, together with Section 1041 of the Revised Statutes, had its genesis in the statute entitled "An act to further the administration of Justice," approved June 1, 1872 (17 St. L., 197, 198). While Section 1041 refers to a judgment or sentence imposing the payment of a fine in a criminal cause and provides for its enforcement by execution against the property of the defendant, Section 916 is expressly limited in its operation to a judgment recovered in a "common law cause." Hence it has no relation whatsoever to a judgment of the character expressly referred to in Section 1041, which deals exclusively with a judgment for a fine, imposed in a criminal or penal cause.

A "common law cause" has been defined as relating solely to a judgment at law. It therefore does not include a judgment in equity (*Board* vs. *Zachary,* 6 Pet., 635), or in admiralty (*The Blanche Page,* 16 Blatchf., 1), or in a criminal case (*Clark* vs. *Allen,* 114 Fed. Rep., 374, affd. 126 Fed. Rep., 738). From the very fact that a criminal case instituted in a federal court is a statutory proceeding, it must necessarily follow that it is not, and cannot be, a "common law cause."

Irrespective of these considerations, the very framework of Section 916 shows that it does not embrace remedies in equity by independent suit which may have been given by the statutes of a State, but is limited by the phrase "in like causes" to remedies provided in actions at law wherein judgments are recovered.

*Hudson* vs. *Wood*, 119 Fed. Rep., 764.

In that case, Judge Evans, dealing with this phase of the subject, said:

> "Construed in reference to the maxim *'ejusdem generis,'* there would, even in the absence of authority, be great doubt in the mind of the Court whether section 916, Rev. St., embraces remedies in equity at all, or whether its provisions are not limited and confined to legal remedies, such as the old writs of fieri facias, mandamus, and the like, and to any other legal process or remedy which the states may invent or bring into vogue. These doubts are increased when we read section 6 of the act of 1872, and carefully analyze the words of that section in connection with the maxim referred to. Nor are they diminished when we reflect that the Constitution itself has made it essential that great care should be taken to keep separate and distinct the respective remedies at law and in equity. *Fenn* vs. *Holme*, 21 *How.*, 484; *Bennett* vs. *Butterworth*, 11 *How.*, 669. Only 'judgments at law' are in terms referred to in the section, and the remedies made available in this court by it are such as are provided by the laws of Kentucky 'in like causes' by 'execution or otherwise.' The

United States having no common law of its own in 1789, and no general Code of Practice being desirable, Congress, which has the exclusive power to regulate practice in the national courts, no doubt concluded that it was not only appropriate, but essential, for it to authorize the courts of the United States in actions not equitable to use such remedies and writs as were used 'in like causes'—that is, actions at law wherein judgments were recovered—in the States where the court sat. But while this, at that early date, gave the courts ample powers in actions at law, it was not meant, as it seems to us, and as will, we think, be clearly shown by the authorities, to affect, in any manner, remedies in equity, which were to be governed by other rules. Indeed, the court has industriously, but in vain, searched for authority which shows the applicability of section 916 to remedies in equity, and it may be more than doubted whether the power to use as equitable those remedies which are essentially remedies at law can be bestowed by State legislation upon the Federal Courts, although it is clear enough that, if new rights which are equitable in their nature be conferred by State legislation, they may be made available in the Federal Courts, if it can be done pursuant to the modes of equity procedure established by the Supreme Court or by Federal laws, or even in some instances by State laws, where the right and the remedy are practically the same things. *Gormley* vs. *Clark,* 134 U. S., 348, and cases collected in 8 *Notes,* U. S. Rep., 464, 465. But this in no wise depends upon section 916."

*Ex parte Boyd*, 105 U. S., 647, which arose under Section 916, merely presented the question as to whether or not a party in whose favor a judgment was rendered in a common law cause by a court of the United States sitting in the State of New York was entitled to the remedy provided by the statute of that State known as proceedings supplementary to execution. Those proceedings were taken in a common law action. They were not independent proceedings in equity. They involved merely the right of discovery as practised in common law actions brought in that State. As was said by Mr. Justice Matthews:

> "There is certainly nothing in the nature of an examination of a judgment debtor, upon the question as to his title to and possession of property applicable to the payment of a judgment against him, and of the fact and particulars of any disposition he may have made of it, which would render it inappropriate, as a proceeding at law, under the orders of the court, where the record of the judgment remains, and from which the execution issues. Such examinations are familiar features of every system of insolvent and bankrupt laws, the administration of which belongs to special tribunals, and forms no necessary part of the jurisdiction in equity. It is a mere matter of procedure, not involving the substance of any equitable right, and may be located, by legislative authority, to meet the requirements of judicial convenience."

To the same effect is *Railroad Co.* vs. *Hart*, 114 U. S., 654, which was decided on the authority of ***Ex parte Boyd, supra.***

The present action was brought in an entirely different jurisdiction from that in which the indictment against the Waters Pierce Oil Company was tried and where the fine was imposed. It was an independent suit in equity in which purely equitable relief was sought.

Not even the Court by which the fine was adjudged could have assumed jurisdiction in the criminal cause to grant the relief adjudged in the present suit.

As was said by Mr. Justice Field in

*Windsor* vs. *McVeigh*, 93 U. S., 274, 282:

> "All courts, even the highest, are more or less limited in their jurisdiction: *they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable;* or to transactions of a special character, such as arise on navigable waters or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments. Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. *It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a*

*contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will."*

The converse of this proposition must likewise be true. If the proceeding is one brought on the criminal side of the Court, equitable relief cannot be granted to the prosecuting government against the defendant and *a fortori* such relief cannot be awarded against third parties.

## III.

**The transfer by the Waters Pierce Oil Company of its property to the Pierce Oil Corporation having been made in good faith nearly a year prior to the imposition of the fine, even were the trust fund theory otherwise applicable, it does not inure to the benefit of one not a creditor at the time of the transfer and distribution of the corporate property.**

There has been no suggestion that the transfer was made with an actual fraudulent intent. The bill of complaint contains no allegation of fraud; nor does the agreed statement of facts intimate that any of the defendants harbored a fraudulent intent.

In *Graham* vs. *Railroad Co.*, 102 U. S., 148, it was decided that where a corporation, solvent at the time and having no actual intent to defraud creditors, disposes of its lands for an inadequate consideration or by voluntary conveyance, its subsequent creditors cannot question the transaction.

Mr. Justice Bradley concluded his opinion with this statement:

> "When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds, trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his. We see no reason why the disposal by a corporation of any of its property should be questioned by subsequent creditors of the corporation, any more than a like disposal by an individual of his property should be so. The same principles of law apply to each."

In Horbach vs. Hill, 112 U. S., 144, 149, the rule applicable to a transfer by an individual was thus stated by Mr. Justice Field:

> "The complainant not showing that he was at the time a creditor, cannot complain. Even a voluntary conveyance is good as against *subsequent* creditors unless executed as a cover for future schemes of fraud."

While we contend, as shown under previous Points, that the United States never became, and is not, a creditor of the Waters Pierce Oil Company because of the imposition of a fine after its conviction under the indictment found in 1907, in no view of the case could it have become a creditor until after the trial, conviction and imposition of

the fine. All of these acts occurred nearly a year after the disposition of the property. Hence, if the United States became a creditor at all, it was not a creditor at the time of the transfer, but only became a subsequent creditor of the corporation.

In *Hollins* vs. *Briercfield Coal & Iron Co.*, 150 U. S., 371, 383, 385, *Graham* vs. *Railroad Co.*, *supra*, was cited in elucidation of the trust fund theory, and commenting on it, Mr. Justice Brewer said:

> "With reference to the suggestion in this last paragraph, it may be observed that the Court does not attempt to determine who are proper parties to maintain a suit for the administration of the assets of an insolvent corporation. All that it decides is, that when a court of equity does take into its possession the assets of an insolvent corporation, it will administer them on the theory that they in equity belong to the creditors and stockholders rather than to the corporation itself. In other words, and that is the idea which underlies all these expressions in reference to 'trust' in connection with the property of a corporation, the corporation is an entity, distinct from its stockholders as from its creditors. Solvent, it holds its property as any individual holds his, free from the touch of a creditor who has acquired no lien; free also from the touch of a stockholder who, though equitably interested in, has no legal right to, the property. Becoming insolvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, place the property in a condition of trust, first,

for the creditors, and then for the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property and their conditional liability to its creditors. *It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder.*"

See also:

*Wabash, St. Louis & Pacific Ry.* vs. *Ham,* 114 U. S., 587;
*Fogg* vs. *Blair,* 133 U. S., 534, 541.

In *McDonald* vs. *Williams,* 174 U. S., 397, it was held, on the authority of these cases, that the receiver of a National Bank cannot recover a dividend paid to a stockholder not at all out of profits but entirely out of capital when the stockholder receiving such dividend acted in good faith believing the same to be paid out of profits and when the bank at the time such dividend was declared and paid was not insolvent.

See also:

McDonald vs. Dewey, 202 U. S., 529;
Wallace vs. Penfield, 106 U. S., 260, 262;
Horbach vs. Hill, 112 U. S., 144, 149.
*Schreyer* vs. *Scott,* 134 U. S., 409, 410;
*Lant* vs. *Manley,* 71 Fed. Rep., 18;
*Merchants Bank* vs. *Thomas,* 121 Fed. Rep.;
*Montgomery* vs. *Whitehead,* 40 Col., 327; 11 L. R. A., N. S., 230;

*Boston Trust Co.* vs. *Merchants Telegraph Co.*, 36 Fed. Rep., 297;
*Coe* vs. *East & West Ry. Co.*, 52 Fed. Rep., 534;
*Toledo R. R. Co.* vs. *Continental Trust Co.*, 95 Fed. Rep., 519, 528;
*Whitney* vs. *Kelly*, 94 Cal., 148, 49;
*Savings Bank* vs. *Ritchie*, 121 Fed Rep., 956, 959;
*Coleman* vs. *Hagey*, 252 Mo., 102, 135.

Judge Hook regards *Swan Land and Cattle Co.* vs. *Frank*, 148 U. S., 603, as "the nearest approach to the case at bar in its facts." An examination of that decision does not sustain that conclusion. The plaintiff there had a claim for unliquidated damages against a corporation which had not been dissolved but had merely distributed its corporate funds among its stockholders and ceased or suspended business. Without reducing the claim to judgment the plaintiff sued on the equity side in the United States Circuit Court some of the stockholders of the corporation to reach and subject the assets so received by them to the payment and satisfaction of his claim, without making the corporation a defendant and bringing it before the court. It was decided that without having first exhausted his remedies at law and without bringing the corporation before the Court, he could not maintain the action, the corporation being an indispensable party.

In this aspect there is a strong resemblance between the case cited and the present. While it is true that the Waters Pierce Oil Company was originally made a defendant, by the very judgment now sought to be revieved it was decreed that the Waters Pierce Oil Company should be dismissed from

the cause "without day." For all practical purposes, therefore, that corporation was not, and is not before the Court, and the *sine qua non* of relief in equity is lacking.

See also:

*Dearfield* vs. *Nimms*, 110 Mass., 115;
*Gaylord* vs. *Kelshaw*, 1 Wall., 81, 82.

In discussing the theory of the bill in *Swan Land & Cattle Co.* vs. *Frank* (*supra*), Mr. Justice Jackson said:

> "The theory of the bill is, that the assets of the vendor corporations which have been distributed to and received by the defendants as stockholders constitute a trust fund for the payment of all debts and judgments against the companies, and may, therefore, be followed in the hands of, and recovered from, such stockholders, to the extent necessary to discharge valid claims against the corporations from which they were received. The funds sought to be reached are undoubtedly applicable, under proper proceedings, against all necessary parties, to the payment, so far as may be needed, *of all outstanding indebtedness against the corporations which distributed the same;* but the difficulty here is that the complainant has not adopted the requisite and necessary procedure to subject said funds thereto."

It is thus evident that, before such an action as the present can be maintained, there must have existed at the time of the distribution of the corporate assets an outstanding indebtedness against the corporation. Such is not the case here.

## IV.

**The creditor's bill in this case was prematurely brought, because at the date of its filing no execution had been issued or returned nulla bona against the Waters Pierce Oil Company in Missouri.**

A creditor's bill can only be brought by a creditor who has exhausted his legal remedy. This suit was filed in the United States District Court for the Eastern District of Missouri on February 18, 1916 (*Rec.*, page 8). No execution was issued in that district until March 19, 1917, and was not returned *nulla bona* until March 28, 1917 (*Rec.*, page 33).

In *National Tube Works Co.* vs. *Ballou*, 146 U. S., 517, a creditor's bill brought in the Circuit Court of the United States for the Southern District of New York was dismissed where it was merely shown that a judgment had been obtained against the debtor in Connecticut and an execution was there returned unsatisfied, there being nothing in the bill to indicate that the plaintiff had recovered a judgment against the corporation in any court within that State or issued an execution within the State.

Legal remedies must be exhausted before suit brought. The defect cannot be subsequently supplied.

12 *Cyc.*, 25;
*Wee* vs. *Delahaye*, 95 Iowa, 667;
*Bank* vs. *McCormick*, 44 Atl. Rep., 706.

## V.

**At the time when this suit was brought the Government had instituted a suit in the Western District of Louisiana against the Pierce Oil Corporation for the recovery of the amount of the fine imposed on the Waters Pierce Oil Company, based on the assumption of all of the debts, obligations and liabilities of the Waters Pierce Oil Company. The bringing of such suit constituted an irrevocable election of remedies.**

By bringing this action the Government asserted that the Pierce Oil Corporation had become its debtor by virtue of the assumption clause in the contract whereby the property of the Waters Pierce Oil Company had been acquired. That operated as a novation.

> *Friedenwald Co.* vs. *Asheville Tobacco Works*, 117 N. C., 544.

At all events, having treated the Pierce Oil Corporation as obligated to pay the fine that had been imposed on the Waters Pierce Oil Company under the covenant which constituted a part consideration for the transfer by the latter Company of its property to the covenantor, the appellee, by bringing a suit against the Pierce Oil Corporation upon such covenant ratified the transfer. There was a manifest inconsistency in subsequently suing the appellants on the theory that the transfer by the Waters Pierce Oil Company to the Pierce Oil

Corporation was wrongful and that a part of the consideration received and distributed was a trust fund for the benefit of creditors. This certainly amounts to blowing hot and cold at the same time. The transfer was either voidable as against the appellee, or it was valid. It could not be both. When, therefore, the appellee undertook to recognize the transfer by suing for the consideration, it could not thereafter be heard to question the validity of the transfer. An election of remedies once made under such circumstances must be regarded as irrevocable.

*Fowler* vs. *Bowery Savings Bk.*, 113 N. Y., 450;
*Whalen* vs. *Stuart*, 194 N. Y., 505;
*Moller* vs. *Tuska*, 87 N. Y., 166;
*Bach* vs. *Tuch*, 126 N. Y., 53;
*Morris* vs. *Rexford*, 18 N. Y., 352;
*Acer* vs. *Hotchkiss*, 97 N. Y., 395;
*Conrow* vs. *Little*, 115 N. Y., 387;
*Terry* vs. *Munger*, 121 N. Y., 161;

In *Fowler* vs. *Bowery Savings Bank, supra*, White made a deposit with defendant in trust for his wife, plaintiff's executrix, receiving a passbook. After the death of both husband and wife and the issuance of letters testamentary on the wife's estate to plaintiff he called on the defendant and demanded payment of the deposit. He was informed that it would be paid him when he came with the passbook, which was in the possession of the husband's executor. The latter presented the passbook with proof of his appointment, and defendant then paid him the deposit on surrender

of the passbook. After learning of this payment the plaintiff brought suit against the husband's executor, and being unable to collect the judgment recovered, sued the bank. It was held that the plaintiff could have brought either an action against the defendant to recover the deposit or on against the husband's executor for money had and received, that by electing the latter remedy he lost the former, since by so doing he had adopted and ratified the action of defendant in making the payment.

The opinion follows *Scarf* vs. *Jardine* L. R. 7 App. Cases 345 and *Rawson* vs. *Turner* 4 Johns, 469, which in principle resemble the present case.

## VI.

**It was plain error for the Courts below to award judgment against the appellants not only for the amount of the fine but for interest thereon from the date of the indictment, more than seven years anterior to the conviction and sentence of the Waters Pierce Oil Company.**

Under Point I we have discussed the peculiar nature of a fine imposed by way of punishment on a conviction in a criminal case. To the authorities cited, there should now be added those in which it has been adjudged that, where a defendant against whom a fine has been imposed dies before the fine has been paid, the fine cannot be collected from his estate.

*United States* vs. *Mitchell*, 163 Fed. Rep., 1014; aff'd sub. nom. *United States* vs. *Dunne*, 173 Fed. Rep., 254.

*United States* vs. *Pomeroy*, 152 Fed. Rep., 279.

*Dyer* vs. *United States*, 186 Fed. Rep., 623.

*United States* vs. *Theurer*, 213 Fed. Rep., 964.

In *People ex rel. Warfield* vs. *Sutter Street Ry. Co.*, 129 Cal., 545, 62 Pac. Rep., 104, a fine of $5,000 was imposed on the defendant because of its usurpation of a franchise. After judgment had been affirmed on appeal the defendant tendered $5,000 and costs, but refused to pay interest on the fine. The Civil Code provided that interest shall be payable on judgments recovered in the courts of the that the fine imposed upon the defendant did not State at seven per cent. It was nevertheless held carry interest, the Court saying:

> "The defendant in this case was not fined for the purpose of compensating the State, nor for the purpose of returning to it anything that had heretofore belonged to it. The judgment of fine was solely for the purpose of punishment, and was not based on any evidence of loss or damage, but rested (within the limit prescribed by the statute) solely within the discretion of the court. It would, we think, be more proper to speak of it as a sentence or judgment imposed on the defendant than to say that it was a judgment recovered against him. * * * On no theory of compensation

to the State for the use or detention of money can interest be allowed on the judgment. The defendant was never indebted to the State, and the money derived from the fine imposed on defendant was not to be paid into the State treasury until it should be collected."

In *State* vs. *Steen*, 14 Tex., 396, 398, the defendant was convicted of a crime was fined $250, and appealed to the Supreme Court, which affirmed the judgment. The question then arose as to whether the Court could discharge the defendant upon payment of the principal of the judgment without interest. It was held that interest was not collectible, the Court saying:

"A fine, it is true, is a judgment. In criminal law it is a pecuniary punishment imposed by the judgment of a court upon a person convicted of a crime. But we do not think it such a judgment as comes within the intention of the law allowing interest upon judgments. * * * It is imposed as a punishment solely, and its payment, as the term imports, is an end of the punishment. * * * There is equity and justice in allowing interest to be recovered upon judgments rendered upon pecuniary demands; but it is not easy to perceive what equity there can be in requiring punishments to accumulate by the lapse of time, or upon what principle the State can demand that fines shall accumulate in the form of interest."

In *United States* vs. *Jacob Schmidt Brewing Co.*, 254 Fed. Rep., 714, the defendant had been con-

victed of shipping intoxicating liquors without properly marking the package which contained them. It was found guilty and was fined $7,250. It sued out a writ of error to review the judgment, which was affirmed. The question then arose as to whether the payment of interest on the amount of the fine could be enforced. Holding in the negative, Judge Amidon said:

> "At common law a judgment does not bear interest as an absolute matter of right. Whether interest is recoverable depends upon the nature of the judgment, and as a rule upon whether interest is awarded by some statute upon all judgments of the class to which the particular judgment belongs. Judgments imposed as a punishment for the violation of a criminal law stand in a class by themselves. * * * This subject, however, is settled for federal courts by Section 966 of the Revised Statutes. * * * Congress having undertaken to deal with the subject of interest upon judgments, and having expressly restricted the allowance of interest to judgments in civil causes, the implication is strong that judgments in criminal causes do not bear interest."

Section 966 of the *United States Revised Statutes,* just referred to and which would seem to be controlling, reads as follows:

> "Interest shall be allowed on all judgments *in civil causes,* recovered in a circuit or district court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the State in

> which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such state; and it shall be calculated *from the date of judgment*, at such rate as is allowed by law on judgments recovered in the courts of such state."

As was pointed out by Judge Amidon, this statutory provision refers solely to judgments "in civil causes." That necessarily excludes judgments in criminal cases.

As was said by Mr. Justice Brown in *United States* vs. *Verdier*, 164 U. S., 218:

> "But interest being a matter of purely statutory regulation, we are bound to give or withhold it as the statute directs."

Here the statute merely directs the allowance of interest on judgments in civil causes. This implies a withholding of it from judgments which do not come within that description.

It has also been held that this section does not refer to decrees in equity.

*Hagerman* vs. *Moran*, 75 Fed. Rep., 97.

See also,

*Perkins* vs. *Fourniquet*, 14 How., 328.

Not only did the District Court allow interest on the judgment entered upon the fine, but it made the interest retroactive as of the date of the filing of the indictment, January 29, 1907, although the trial did not take place and the fine was not im-

posed until March 20, 1914. This entirely ignores the express limitation of *Section* 966 of the *United States Revised Statutes*, which declares that where interest is allowed on judgments in civil causes "it shall be calculated from the date of the judgment." Here the calculation covered a period of more than seven years before the date of the judgment.

The mere statement of these facts plainly points out the commission of a grave error. The matter was called to the attention of the United States Circuit Court of Appeals by the petition for a rehearing (*Rec.*, pages 65, 66). The majority of the Court, however, denied the petition on the ground that the question was not raised by the assignments of error and briefs on the hearing (*Rec.*, page 72). Although it was not presented *ipsissimis verbis* by the assignments of error, it was nevertheless covered by the 16th assignment (*Rec.*, page 54), which reads:

> "16. That the decree entered in this cause is inequitable, unjust, unfair and unconscionable."

The authorities above cited indicate that the allowance of interest on a fine is inequitable in any case. Its allowance for a period long antedating the imposition of the fine and to an extent equivalent to forty-three per cent. of the amount of the fine, was not only inequitable, but also unjust, unfair and unconscionable.

An examination of appellants' brief in the Circuit Court of Appeals shows that, at page 20, the following statement was made, although not in the form of an independent point:

"A fine does not bear interest. It is very different from an ordinary judgment. *State* vs. *Streen*, 14 Tex., 396-398; *People* vs. *Ry.*, 129 Cal., 545, 79 Am. St. R., 137."

The assignments of error filed on the allowance of the appeal to this Court, as shown above, include the following (*Rec.*, page 75):

"VIII. The Court of Appeals erred in affirming the decree of the District Court in awarding the United States interest from the date of the indictment within the Western District of Louisiana, to wit, January 29, 1907, when conviction thereupon was not obtained until March 20, 1914, and erred in affirming the award of interest upon the judgment obtained on said last named date."

Even had there been no sufficient assignment of error either on the appeal to the Circuit Court of Appeals or to this Court, under Rules XXI and XXXV "the court at its option may notice a plain error not assigned or specified."

The instances in which this power has been exercised are numerous.

*World's Columbian Exposition* vs. *Republic of France*, 91 Fed. Rep., 64.
*United States* vs. *Pena*, 175 U. S., 500.
*Behn* vs. *Campbell*, 205 U. S., 403.
*Weems* vs. *United States*, 217 U. S., 349.
*Columbia Heights Realty Co.* vs. *Rudolph*, 217 U. S., 547.
*Briscoe* vs. *Rudolph*, 221 U. S., 547.

*Central Improvement Co.* vs. *Cambria Steel Co.*, 201 Fed. Rep., 811.
*A. Santaella & Co.* vs. *Otto F. Lange Co.*, 155 Fed. Rep., 719.

This was a suit in equity which was tried on an agreed statement of facts. For that reason also the liberal rule has been applied in some jurisdictions—that since the appeal brings up the entire record, it is in itself a sufficient assignment of error.

*Mershon* vs. *Morris*, 148 N. C., 48; 61 S. E. Rep., 647.
*In re Davidson*, 21 Cal. App., 118; 131 Pac. Rep., 67.

## VII.

**It is respectfully submitted that the decrees of the District Court of the United States for the Eastern District of Missouri and of the United States Circuit Court of Appeals for the Eighth Circuit should be reversed and the bill of complaint dismissed, with costs.**

LOUIS MARSHALL,
Appellant's Counsel.

# In the Supreme Court of the United States.

OCTOBER TERM, 1919.

CLAY ARTHUR PIERCE, HENRY CLAY PIERCE, and Pierce Investment Trust Company, Petitioners,
v.
UNITED STATES OF AMERICA.
No. 538.

*PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.*

## BRIEF FOR THE UNITED STATES IN OPPOSITION.

### STATEMENT OF THE CASE.

This is a suit in the nature of a creditor's bill brought by the United States in the United States District Court for the Eastern District of Missouri against the Waters-Pierce Oil Company and certain of its stockholders to recover the amount of a judgment obtained against that company in the United States District Court for the Western District of Louisiana.

In January, 1907, the Waters-Pierce Oil Company, a Missouri corporation, was indicted in the United States District Court in Louisiana for receiving rebates on interstate shipments contrary to the

Elkins Act (32 Stat. 847), an offense punishable by fine only. In March, 1914, the case was tried with the result that the defendant was convicted on fourteen counts and the minimum fine of $1,000 was imposed on each count. In March, 1915, the judgment was affirmed by the Circuit Court of Appeals for the Fifth Circuit (222 Fed. 69).

In the meantime, in July, 1913, the Waters-Pierce Oil Company sold and conveyed all its property and assets to the Pierce Oil Corporation for $5,000,000 in money and $10,500,000 of the common stock of the latter. The money and shares of stock were lodged with trustees who distributed them ratably among the stockholders of the Waters-Pierce Oil Company, and that company thereupon ceased business. The vendee assumed all the vendor's "debts, liabilities, and obligations."

After the conviction of the Waters-Pierce Company an execution was issued to the marshal of the Louisiana district and returned *nulla bona* in August, 1915. This suit was begun in February, 1916. In March, 1917, another execution was issued on the judgment in Louisiana, but directed to the marshal for the Eastern District of Missouri, which was also returned *nulla bona*. In August, 1917, the Government filed an amended complaint setting forth the facts regarding the second execution.

The district court, on March 11, 1918, rendered a decree against three of the stockholders and dismissed the complaint as to the Waters-Pierce Oil Company and the trustees. Said stockholders there-

upon appealed to the Circuit Court of Appeals for the Eighth Circuit, where the decree was affirmed—Circuit Judges Hook and Stone concurring and Wade, district judge, dissenting. The decree against the stockholders was not in excess of the amounts of money they received in the distribution of the proceeds of the sale.

## ARGUMENT.

### I.

### The case is not of the kind reviewable by this court by writ of certiorari.

The power conferred upon this court to review by writ of certiorari the judgments and decrees of courts otherwise final "should be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *American Construction Co.* v. *Jacksonville Ry. Co.*, 148 U. S. 372, 383; *Forsyth* v. *Hammond*, 166 U. S. 506, 514; *Fields* v. *United States*, 205 U. S. 292, 296; *Heike* v. *United States*, 227 U. S. 131, 144; *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U. S. 251, 258.

1. *The case is not of general importance.*—The case is not one of interest to a large number of persons; it involves nothing affecting the relations of this country with foreign nations, and indeed no matter of general interest to the public. As remarked by this court in the *Fields Case, supra*, the case is of importance only to the applicants.

2. *There is no conflict of decision.*—Petitioners do not contend that the decision below is in conflict with that of any other court. Indeed, their petition is based, in part, upon the allegation that the questions of law involved have not been passed on by this court or by any Federal court. (Pet. 11.)

## II.

**No error was committed by the court below.**

1. *A creditor's bill was clearly the appropriate proceeding under the circumstances of the case.*—The judgment against the Waters-Pierce Oil Company in Louisiana was an adjudication that the company was indebted to the United States. The situation is exactly the same as if the judgment had been entered on any civil obligation. Upon the entry thereof the Government became entitled to pursue the same measures to insure collection as in a civil case. This is the clear implication of section 1041 of the Revised Statutes:

> In all criminal or penal causes in which judgment or sentence has been or shall be rendered imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced * * *.

The resort to equity to recover on a judgment in a criminal case is not, as contended by petitioners, new to our jurisprudence. Indeed, the practice

was treated as well settled by the Supreme Court of Appeals of West Virginia in the case of *State* v. *Burkholder,* 30 W. Va. 593, 5 S. E. 439. That was a suit to enforce a judgment for fines and costs against certain property which Burkholder had conveyed to his wife prior to the entry of the judgment. In sustaining the suit the court said:

> We have cited enough authority to show that an individual can no more be permitted to defraud the State in a conveyance than he can a person; that where a person conveys his property with intent to defraud his creditors, and the State is one of those creditors, both reason and authority show that the State can maintain a suit to have that conveyance declared fraudulent as to its claim, in the same manner and with like effect as an individual creditor can. It would be strange indeed, and a reproach to the administration of justice, if the State in such a case would have less rights and less power to procure what is justly due it than one of its citizens in a like situation; that if a citizen were defrauded the courts were open to him for redress, but the State might with impunity be defrauded out of its just claims. The State, then, under the circumstances, had the same right to maintain a suit to set aside the fraudulent conveyance as a citizen would have had if he had recovered a judgment against the defendant, George Burkholder.

2. *The property of the Waters-Pierce Oil Company upon its insolvency became a trust fund for the benefit*

*of its creditors.*—When the Waters-Pierce Company transferred its assets to the Pierce Oil Corporation and distributed the proceeds of the sale among its stockholders, it was left without means of any kind. The funds arising from the sale of its assets are, as respects creditors, the substitutes for the things sold, and as such they are subject to the same liabilities as the things sold before the transfer. This doctrine was laid down by this court in the early case of *Railroad Company* v. *Howard*, 7 Wall. 409:

> Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it into whosesoever possession it may be transferred, unless it has passed into the hands of a bona fide purchaser; and the rule is well settled that stockholders are not entitled to any share of the capital stock nor to any dividend of the profits until all the debts of the corporation are paid.
>
> Assets derived from the sale of the capital stock of the corporation, or of its property, become, as respects creditors, the substitutes for the things sold, and as such they are subject to the same liabilities and restrictions as the things sold were before the sale, and while they remained in the possession of the corporation. Even the sale of the entire capital stock of the company and the division of the proceeds of the sale among the stockholders will not defeat the trust nor impair the remedy of the creditors, if any debts remain unpaid, as the creditors in that event may

> pursue the consideration of the sale in the hands of the respective stockholders, and compel each one, to the extent of the fund, to contribute *pro rata* towards the payment of their debts out of the moneys so received and in their hands.

And to the same effect are *Curran* v. *State of Arkansas*, 15 How. 307, and *Blake* v. *McClung*, 172 U. S. 254. As to the right to proceed against certain of the stockholders, without joining all, see *Hatch* v. *Dana*, 101 U. S. 205.

### CONCLUSION.

It is respectfully submitted that the petition for writ of certiorari should be denied.

ALEX. C. KING,
*Solicitor General.*
A. F. MYERS,
*Attorney, Department of Justice.*

OCTOBER, 1919.

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# SUBJECT INDEX.


| | Page. |
|---|---|
| THE FACTS | 1 |
| ASSIGNMENTS OF ERROR | 4 |
| BRIEF | 4 |
| I. The judgment obtained against the Waters Pierce Co. was collectible by execution | 4 |
| II. The judgment being in the nature of a judgment debt must be treated as a debt | 5 |
| III. A suit in the nature of a creditors' bill was a proper course to pursue to collect the amount of the judgment against the Waters Pierce Oil Co. from the appellants | 11 |
| IV. The contention that even if the judgment is a debt it became a debt or judgment debt after the reorganization of the Waters Pierce Oil Co., and hence as a subsequent creditor the United States has no rights in the premises, is unsound | 17 |
| V. There is a proper joinder of parties and causes of action in the bill of complaint | 23 |
| VI. The Government's suit against the Pierce Oil Co. in the Western District of Louisiana was no election of remedies barring the United States from bringing the present suit | 27 |
| VII. There was no necessity of bringing suit in Missouri | 34 |
| VIII. The question as to whether interest upon the judgment was properly awarded, not having been raised in the court below, will not be passed on here | 39 |
| CONCLUSION | 43 |


## AUTHORITIES CITED.


| | |
|---|---|
| *Adams* v. *Wood*, 2 Cranch 336 | 6 |
| *Baltimore and Ohio Telegraph Co.* v. *Interstate Telegraph Company*, 54 Fed. 50 | 18 |
| *Bishop on Criminal Procedure, 3d ed.* (1880), sec. 1304 | 7 |
| *Bitterman* v. *Louisville & Nashville R. R.*, 207 U. S. 205, 226 | 26 |
| *Brady* v. *Daly*, 175 U. S. 148, 160 | 33 |
| *Brown* v. *Clarke*, 4. How. 3, 15 | 41 |
| *Brown* v. *Guarantee Trust & Safe Deposit Co.*, 128 U. S. 403 | 26 |
| *Chaffee and Company* v. *United States*, 18 Wall. 516 | 6 |

| | Page. |
|---|---|
| *Cleveland, etc., Ry. Co., v. Cleveland*, 235 U. S. 50 | 39 |
| *Corpus Juris*, vol. 20, p. 8 | 28 |
| *Crawford v. Washington Northern Railroad Company*, 233 Fed. 962 | 25 |
| *Curran v. State of Arkansas et al.*, 15 How. 304, 307 | 12 |
| *Davies v. Corbin*, 112 U. S. 36, 40 | 16 |
| *Elder v. Western Mining Company*, 237 Fed. 970, 977 | 25 |
| *Fink v. O'Neil*, 106 U. S. 272, 284 | 8 |
| *Fowler v. Palmer et al.*, 160 Fed. 1 | 26 |
| *Giles v. Heysinger*, 159 U. S. 627, 630 | 42 |
| *Hatch v. Dana*, 101 U. S. 205 | 27 |
| *Jones v. Green et al.*, 1 Wall. 330, 332 | 17 |
| *Jones Manuel Equity Pleading & Practice*, page 49 | 26 |
| *Keokuk and Hamilton Bridge Co. v. Illinois*, 175 U. S. 626 | 40 |
| *Lagrange v. Chouteau*, 4 Pet. 287, 288 | 42 |
| *Lloyd v. Preston*, 146 U. S. 630, 645 | 40 |
| *Mallers v. Commercial Loan & Trust Co.*, 216 U. S. 613 | 39 |
| *Miller Rubber Company v. Behrend*, 242 Fed. 515, 517 | 22 |
| *M'Mullen Lumber Co. v. Strother*, 136 Fed. 295 | 26 |
| *Nauman Company v. Bradshaw*, 193 Fed. 350, 354 | 31 |
| *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482, 502, 503 | 17, 18 |
| *Railway v. Howard*, 7 Wall. 392, 409 | 12 |
| *Rankin v. Tygard et al.*, 198 Fed. 795, 806 | 31 |
| *Roemer v. Bernheim*, 132 U. S. 103, 106 | 41 |
| *Rogers v. Penobscot Mining Co.*, 154 Fed. 606 | 26 |
| *Simpkins Federal Equity Suit*, page 250 | 26 |
| *Slaughter et al. v. La Compagnie Francaises Des Cables Telegraphiques*, 119 Fed. 588, 589 | 23 |
| *Smith et al. v. Vodges*, 92 U. S. 183 | 23 |
| *South Penn Oil Co. v. Calf Creek Co.* (C. C.), 140 Fed. 507–516 | 26 |
| *State v. Lynch*, 28 Rhode Island, 463, 464 | 37 |
| *Stockwell v. United States*, 13 Wall. 531 | 5, 6 |
| *Swan Land and Cattle Company v. Frank*, 148 U. S. 603 | 20 |
| *Thomas v. Sugarman*, 218 U. S. 129 | 28 |
| *Toland v. Sprague*, 12 Peters, 300, 328 | 35 |
| *United States v. Claflin*, 97 U. S. 546 | 6 |
| *United States v. Dunne*, 173 Fed. 254, 257, 258 | 10 |
| *United States v. Stacey*, 155 Fed. 510 | 8 |
| *United States v. Younger*, 92 Fed. 672 | 6 |
| *Virtue v. Creamery Package Co.*, 227 U. S. 8, 38 | 40 |
| *Wasserman v. United States et al.*, 161 Fed. 722 | 4 |
| *Waters Pierce Oil Company v. Texas*, 212 U. S. 112 | 39 |
| *Weir v. Bay State Gas Co.*, 91 Fed. 940 | 26 |
| *Westervelt v. Mohrenstecher*, 76 Fed. 118, 124 | 28 |
| *Wharton's Criminal Procedure* (10th ed.), sec. 1862 | 8 |
| *Williams on Executors*, volume 3, page 240 (7th ed.) | 8 |
| *Zimmerman v. Harding*, 227 U. S. 489 | 28 |

## STATUTES AND RULES.


| | Page. |
|---|---|
| Elkins Act of February 19, 1903, 32 Stat., c. 708, p. 847 | 5 |
| Revised Statutes, section 1041 | 7 |
| Revised Statutes, section 1042 | 7 |
| Revised Statutes, section 986 | 35 |
| New Equity Rules, rule 26 | 23 |
| New Equity Rules, rule 34 | 36 |

# In the Supreme Court of the United States.

OCTOBER TERM, 1920.

CLAY ARTHUR PIERCE, HENRY CLAY Pierce, and Pierce Investment Company, appellants,
*v.*
THE UNITED STATES.
No. 173.

*APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.*

## BRIEF FOR THE UNITED STATES.

This case is here on appeal from a decree of the Circuit Court of Appeals for the Eighth Circuit affirming a decree entered by the District Court for the Eastern District of Missouri against the appellants for $14,000 and interest, in satisfaction of a previous judgment against the Waters Pierce Oil Company for violating the Elkins Act of February 19, 1903 (32 Stat. c. 708, p. 847).

### THE FACTS.

On January 29, 1907, an indictment was returned against the Waters Pierce Oil Company in the District Court for the Western District of Louisiana, charging the company with a violation

of the Elkins Act. On March 20, 1914, a verdict of guilty was returned and the court entered a judgment in favor of the United States for $14,000 and costs. This judgment was affirmed by the Circuit Court of Appeals for the Fifth Circuit. Thereafter execution upon the said judgment was issued out of the District Court for the Western District of Louisiana, upon which execution the marshal made a nulla bona return. A subsequent execution issued to the marshal of the Eastern District of Missouri was returned nulla bona.

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Pursuant to a judgment in favor of the United States the American Surety Company of New York paid the cost of the prosecution. The judgment against the Waters Pierce Oil Company for the amount of the fine has not been paid. In the meantime, on July 7, 1913, the Waters Pierce Oil Company sold all of its property and assets to the Pierce Oil Corporation for certain stock and cash consideration. Henry S. Priest and Clay Arthur Pierce were appointed agents and trustees of the Waters Pierce Oil Company to receive from the Pierce Oil Corporation the consideration aforesaid and did actually receive the same. At the time of the transfer, Henry Clay Pierce was the owner of 2,727 shares of the common stock of the Waters Pierce Oil Company. The Pierce Investment Company was the owner of 1,000 shares and Clay Arthur Pierce owned one share. Each of the

above parties received his pro rata share of cash and stock from the Pierce Oil Corporation. Their shares were in excess of the amount of the judgment in this case.

The Waters Peirce Oil Company had no assets out of which a judgment could be collected, as the transfer to the Pierce Oil Corporation embraced all of the company's assets, and left it without any means or power to meet the judgment due to the United States. The company ceased to do business and was no longer a going concern. The stipulation shows, however, that the Waters Pierce Oil Company is, and at all times herein mentioned, was, a corporation duly organized.

This suit was brought against the Waters Pierce Oil Company, Henry S. Priest, Clay Arthur Pierce, Henry Clay Pierce, and Pierce Investment Trust Company to pursue the assets of the Waters Pierce Oil Company and compel payment.

The District Court held that the judgment obtained by the United States in the Western District of Louisiana was a valid and subsisting judgment against the Waters Pierce Oil Company, and, as that corporation had divested itself of all its property and had no assets subject to execution, the amounts shown to have been received in the distribution of the assets of the company by the appellant were held to be subject to the payment of the judgment against the corporation. Decree was entered in favor of the United States and against the appellants in the sum of $14,000 with

interest (R. 30–34). This decree was affirmed by the Circuit Court of Appeals for the Eighth Circuit.

**ASSIGNMENTS OF ERROR.**

The appellants assignments of error are found on pages 73, 74, and 75, of the record.

**BRIEF.**

I.

**The judgment obtained against the Waters Pierce Company was collectible by execution.**

Upon conviction an attempt was made to collect the judgment by execution. Such a course is authorized by section 1041 of the Revised Statutes. *Wasserman* v. *United States et al.*, 161 Fed. 722. Section 1041 provides:

> In all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced: *Provided,* That where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid.

Thus it will be seen that a judgment, even in a criminal case, may be enforced by execution.

## II.

**The judgment being in the nature of a judgment debt must be treated as a debt.**

The judgment was merely a fine, no prison sentence being attached. Indeed, the Elkins Act under which the company was convicted imposes only a fine, it being specifically stated that no imprisonment can be imposed:

> Every person or corporation who shall offer, grant, or give or solicit, accept, or receive any such rebates, concession or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. In all convictions occurring after the passage of this act for offenses under said acts to regulate commerce, whether committed before or after the passage of this act, or for offenses under this section, no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished. (32 Stat. c. 708, p. 847.)

Therefore, for a violation the Government can only exact a fine. It has been uniformly held by this court that an action of debt will lie to recover penalties or forfeitures for violations of statutes. *Stockwell* v. *United States,* 13 Wall. 531; *United*

*States* v. *Claflin*, 97 U. S. 546; *Chaffee & Company* v. *United States*, 18 Wall. 516; *Adams* v. *Wood*, 2 Cranch 336; *United States* v. *Younger*, 92 Fed. 672. In these cases the penalties were considered debts due the United States, recoverable in civil actions. Hence, upon the date of the violation, or at least upon the date when the indictment was returned, there existed a liability of the Waters Pierce Oil Company to the United States, which was later merged into a judgment.

In this case, however, it is even more conclusively indicated that a debt was due to the United States. Pursuant to section 1041, above cited, an execution would issue to collect a judgment in a criminal case. In other words, the judgment indicates a debt due, collectible by civil action. Here an indictment was returned upon which a judgment was rendered in favor of the United States for a specified sum of money.

> It can not be that whether an action of debt is maintainable or not depends upon the question who is the plaintiff. Debt lies whenever a sum certain is due to the plaintiff or a sum which can readily be reduced to a certainty—a sum requiring no future valuation to settle its amount. It is not necessarily founded upon a contract. It is immaterial in what manner the obligation was incurred or by what it is evidenced, if the sum owing is capable of being definitely ascertained. *Stockwell* v. *United States*, 13 Wall. 531, 542.

By the judgment in the present case the amount due has been *definitely ascertained* and the amount is a *sum certain.*

Section 1041, Revised Statutes, clearly places judgments in criminal cases in the same class with judgments in civil cases and authorizes a similar procedure for recovery. Judgments in both classes of cases are debts due the United States recoverable in civil actions. Section 1042, Revised Statutes, shows even more plainly that Congress intended to treat such judgments as debts. This section allows a poor convict, when sentenced to pay a fine, an exemption only after he has shown that he has no property amounting to more than $20, except such as is exempt from execution for *debt.*

Thus Congress treated judgments in criminal cases in the same manner as other debts. Property exempt from execution for debt is also exempt from execution for fines. The two above sections conclusively indicate that such judgments are judgment debts and may be recovered in the same manner as any other debts. The leading text writers appear also to have taken this view:

> Very generally in this country, by statutes or under common law, the fine is thus treated as a sort of judgment debt. *Bishop on Criminal Procedure,* 3d ed. (1880), section 1304.
>
> By a statute of the United States a fine or penalty imposed as a "judgment or sen-

> tence" against any person in criminal cases "shall be declared a judgment debt and may be collected on execution in the common form of law." Wharton's Criminal Procedure (10th ed.), section 1862.
>
> An executor or administrator is also liable upon all statutes and recognizances entered into by the deceased; and upon all the inferior debts of record of the deceased, as fines imposed by the justices at Westminster, or at assizes, or quarter sessions, or by commissioners of sewers, or of bankrupts, by stewards in leets, or the like. Williams on Executors, volume 3, page 240 (7th ed.).

In discussing section 1042, Revised Statutes, this court in *Fink* v. *O'Neil,* 106 U. S. 272, 284, said:

> Nothing can be more clear than this, as a recognition by Congress that in case of executions upon judgments in civil actions the United States are subject to the same exemptions as apply to private persons by the law of the State in which the property levied on is found; and that, by this provision in favor of poor convicts, it was intended, even in cases of sentences for fines for criminal offenses against the laws of the United States, that the execution against property for its collection should be subjected to the same exemption as in civil cases.

In the case of *United States* v. *Stacey,* 155 Fed. 510, in passing on claims of exemption of homesteads levied on under executions issued on causes

in which judgment or sentence was rendered imposing the payment of fines, the court held:

> The court also refers to section 5296, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3608), as sustaining this conclusion. Section 5296 is found under title "Remission of Fines." I think this section clearly indicates that Congress intended that a poor convict, in taking the oath prescribed in section 1042, should be discharged from all further liability under the sentence imposing the payment of a fine; in other words, that the fine is thereby remitted. Moreover, section 1041, Rev. St. U. S. (U. S. Comp. St. 1901, p. 724), provides that the judgment for the payment of a fine may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced. If a judgment in a civil case may not be enforced by execution against the exempt property of the defendant, it follows that a judgment for the payment of a fine may not be enforced against such property. Whatever may have been the ruling of the Supreme Court of Alabama on the subject, the legislation of the Congress, as construed by the Supreme Court of the United States thereon, is the authority which is to control this court. In *Clark* v. *Allen* (D. C), 114 Fed. 374, it is held that the exemption of a homestead may be asserted against a fine due to the United States Government. See also, same case (D. C.), 117 Fed. 699.

In the case of *United States* v. *Dunne*, 173 Fed. 254, 257, 258, the question was raised whether a criminal cause abated by the death of the defendant. The judgment had been rendered in favor of the Government in the court below and was in the Circuit Court of Appeals on writ of error. The court held that the cause abated, but in that case the cause was still pending, and in the court below the defendant had not only been sentenced to pay a fine but had been sentenced to serve a prison term. It was on account of these circumstances that the court decided in favor of the defendant.

> In a criminal case, the death of the accused after judgment, and while the case is pending in the Appellate Court upon writ of error, operates to abate the cause.
> * * *
>
> The rule that a statutory penalty merged in the judgment becomes a debt, and may be recovered from the estate of the judgment debtor, does not apply in this case. The indictment was under section 1782 of the Revised Statutes (U. S. Comp. St. 1901, p. 1212), providing that every person offending against the statute should be deemed guilty of a misdemeanor, and should be imprisoned and fined. The verdict of the jury was guilty. The judgment imposed a punishment of a fine and imprisonment as provided by the statute. This judgment is before us, and is made the basis of the claim of the United States against the estate of

> the defendant. For the present purpose it is an indivisible judgment and wholly penal. It can not be separated into parts, and one part kept alive as an indemnity, while the other, as a penalty, perishes with the death of the defendant.

It will be noted that the court recognized the rule that a statutory penalty merged in the judgment becomes a debt. The rule was held inapplicable because the sentence included both fine and imprisonment, and such sentence was not divisible. Here the judgment was a fine—the only sentence which could be imposed. Besides, the point was that the action was still pending in the courts when the deceased died, and, therefore, abated.

## III.

**A suit in the nature of a creditors' bill was a proper course to pursue to collect the amount of the judgment against the Waters Pierce Oil Company from the appellants.**

It has been shown that the judgment against the Waters Pierce Oil Company was a judgment *debt*. The attempt to collect the judgment as provided in section 1041, Revised Statutes, having failed, this suit was brought in equity. The company had sold all its assets, turning over to the appellants, who were stockholders, their shares of the selling price, leaving the company still in existence but insolvent. The appellants received cash and stock in excess of the amount of the dividends. The purpose of a creditors' bill is to provide a remedy or

method for the collection of a debt out of property which can not be reached by execution. In equity the assets or the proceeds from a sale of corporate property are regarded as a trust fund for the payment of the corporate debts. Where such fund has been distributed among the stockholders, leaving debts unpaid, the creditors may pursue the property into the hands of the stockholders and compel payment. *Curran* v. *State of Arkansas et al.*, 15 How. 304, 307.

In *Railway* v. *Howard*, 7 Wallace, 392, 409, this point was involved:

> Equity regards the property of a corporation as held in trust for the payment of the debts of the corporation, and recognizes the right of creditors to pursue it into whosesoever possession it may be transferred, unless it has passed into the hands of a bona fide purchaser and the rule is well settled that stockholders are not entitled to any share of the capital stock nor to any dividend of the profits until all the debts of the corporation are paid.
>
> Assets derived from the sale of the capital stock of the corporation, or of its property, become, as respects creditors, the substitutes for the things sold, and as such they are subject to the same liabilities and restrictions as the things sold were before the sale and while they remained in the possession of the corporation. Even the sale of the entire capital stock of the company and the division of the proceeds of the sale

among the stockholders will not defeat the trust nor impair the remedy of the creditors, if any debts remain unpaid, as the creditors in that event may pursue the consideration of the sale in the hands of the respective stockholders and compel each one, to the extent of the fund, to contribute pro rata towards the payment of their debts out of the moneys so received and in their hands.

Valid contracts made by a corporation survive even its dissolution by voluntary surrender or sale of its corporate franchises, and the creditors of the corporation, notwithstanding such surrender or sale, may still enforce their claims against the property of the corporation as if no such surrender or sale had taken place. Moneys derived from the sale and transfer of the franchises and capital stock of an incorporated company are assets of the corporation, and as such constitute a fund for the payment of its debts, and if held by the corporation itself and so invested as to be subject to legal process, the fund may be levied on by such process, but if the fund has been distributed among the stockholders or passed into the hands of other than bona fide creditors or purchasers, leaving any debts of the corporation unpaid, the established rule in equity is that such holders take the fund charged with the trust in favor of creditors, which a court of equity will enforce, and compel the application of the same to the satisfaction of their debts.

Regarded as the trustee of the corporate fund, the corporation is bound to administer the same in good faith for the benefit of creditors and stockholders and all others interested in its pecuniary affairs, and anyone receiving any portion of the fund by voluntary transfer or without consideration may be compelled to account to those for whose use the fund is held. Creditors are preferred to stockholders on account of the peculiar trust in their favor and because the latter, as constituent members of the corporate body, are regarded as sustaining, in that aspect, the same relation to the former as that sustained by the corporation.

It is not essential to show fraud in the transfer or sale.

It is argued that this is true only when there is fraud in the decree, the appellants insisting that in all other cases a judicial sale operates to pass a title which cuts off all claims of unsecured creditors against the property. They rely on *Wenger* v. *Chicago, &c., R. R.*, 114 Fed. Rep. 34; *Farmers' Loan & Trust Co.* v. *Louisville, &c., Ry. Co.*, 103 Fed. Rep. 110; *Pennsylvania Transportation Co.'s Appeal*, 101 Pa. St. 576; *Kurtz* v. *R. R.*, 187 Pa. St. 59; *Paton* v. *N. P. R. R.*, 85 Fed. Rep. 838; *Shoemaker* v. *Katz*, 74 Wisconsin, 374; *Bame* v. *Drew*, 4 Denio, 287; *Ferguson* v. *Ann Arbor R. R.*, 17 App. Div. 336; *McArdell* v. *Olcott*, 104 App. Div. 263; S. C., 189 N. Y. 368, 384; *Candee* v. *Lord*, 2 N. Y. 269. Some of these cases

> hold directly, and others inferentially, that, in the absence of fraud, as here, a judicial sale is binding upon nonassenting creditors even though the decree was entered and the sale was made in pursuance of a contract, to which the stockholders were parties, and by which they were to retain a stock interest in the purchasing company. This makes the creditor's legal right against the shareholders' interest depend upon the motive with which they act and the method by which they carry out the scheme. If they do so by means of a private contract, though in ignorance of the existence of the creditor, the property remains liable for his debts. If they do so by means of a judicial sale under a consent decree and in like ignorance or disregard of his existence, the result is said to be different, although the shareholders should reserve exactly the same interest and deprive the creditor of exactly the same right. *Northern Pacific Ry. Co.* v. *Boyd,* 228 U. S. 482, 502, 503.

Though it is believed that there is no doubt that a judgment in a criminal case is a debt and that, in this case, it is a debt due the United States from the Waters Pierce Oil Company, in fact, in a legal sense, as much a debt as is one based on a contract or judgment in a civil case, yet a contrary view would not destroy the Government's right in equity.

Section 1041, Revised Statutes, places judgments in criminal cases within the same class as judgments in civil cases, and section 1042, Re-

vised Statutes, strengthens this view. There is no contention that a judgment in a civil case is not recoverable in equity. Section 1041 has provided a method of collecting judgments by the United States by authorizing the issuance of an execution. If the execution is futile, a nulla bona return being made, must the Government drop the matter and lose the money due? Is it not more reasonable to presume that the word "execution" as used in section 1041, Revised Statutes, signifies the processes and proceedings used in enforcing judgments in civil cases? Congress could not have intended to allow a fine to go unpaid merely because the property had been so placed that it could only be reached in equity.

It has been held by this court that the essential facts to be shown to acquire jurisdiction in equity in connection with the creditor's bill are a judgment, and the issuance of an execution upon which a nulla bona return has been made. When such facts have been shown a creditor's bill is in reality merely a further step or aid to the execution in the enforcement of the judgment. *Davies v. Corbin,* 112 U. S. 36, 40.

> In the first case the court, when its aid is invoked, looks only to the execution, and the return of the officer to whom the execution was directed. The execution shows that the remedy afforded at law has been pursued, and of course, is the highest evidence of the fact. The return shows whether the remedy has proved effectual or not, and from the

> embarrassments which would attend any other rule, the return is held conclusive. The court will not entertain inquiries as to the diligence of the officer in endeavoring to find property upon which to levy. If the return be false, the law furnishes to the injured party ample remedy.
>
> In the second case the equitable relief sought rests upon the fact that the execution has issued and a specific lien has been acquired upon the property of the debtor by its levy, but that the obstruction interposed prevents a sale of the property at a fair valuation. It is to remove the obstruction, and thus enable the creditor to obtain a full price for the property, that the suit is brought. (*Jones* v. *Green et al.*, 1 Wall. 330, 332.)

It is therefore insisted that the judgment was a debt due the United States, and secondly, that the word "execution," being broad enough to include proceedings necessary to enforce the judgment, regardless of whether or not the judgment is for all purposes a debt, a creditor's bill will lie to recover the same.

## IV.

**The contention that even if the judgment is a debt it became a debt or judgment debt after the reorganization of the Waters Pierce Oil Company, and hence as a subsequent creditor the United States has no rights in the premises is unsound.**

This contention can not prevail for it has clearly been shown that the violation of the act resulted in a liability to the United States from

the company. This liability as has been previously shown, accrued several years prior to the reorganization. It can, at least, be said that, upon the return of the indictment in 1907, the United States had a claim against the corporation to which its assets were subject. Otherwise, a corporation and its stockholders may evade a penalty regardless of the amount even if the trial is almost completed and a verdict against it practically assured, by distributing its assets to the stockholders during the pendency of the trial. It is true in this case that, at the time the assets were distributed, the judgment had not been rendered and the claim was not, therefore, liquidated, but it was a claim that the corporation and stockholders knew would be liquidated. However, it is immaterial that a judgment had not been rendered. The right of action had accrued upon which a prosecution was pending. The case of *Northern Pacific Railway* v. *Boyd,* 228 U. S. 482, is practically analogous to the present case. There the claim was unliquidated at the time the corporation became insolvent, by selling and distributing all its assets. The claim, although liquidated and a specified amount, *ascertained subsequent to the sale,* was held to be valid and a judgment was rendered in equity against the Northern Pacific Railway, which had bought stock from the insolvent corporation. In the case of *Baltimore and Ohio Telegraph Company* v. *Interstate Telegraph Company,* 54 Fed. 50, a creditors bill was

brought against the Baltimore and Ohio Railroad and the Baltimore and Ohio Telegraph Company, by the Interstate Telegraph Company to recover a judgment rendered subsequent to the insolvency of the Baltimore and Ohio Telegraph Company. A decree in favor of the Interstate Telegraph Company was affirmed.

> A railroad company, owning an extensive telegraph system, caused the incorporation of a telegraph company by its officials, furnished its entire capital stock, and in the name of such telegraph company contracted with complainant. For breach of such contract, complainant recovered judgment against the telegraph company. The railroad company sold the entire telegraph plant, received all the consideration, and left the telegraph company insolvent, and without assets of any kind. *Held*, that the money realized by the railroad company from such sale was in its hands a trust fund properly applicable to the payment of such judgment, and that payment thereof would be enforced by a court of equity. 51 Fed. Rep. 49, affirmed. (From the syllabus.)

The court recognized the Interstate Telegraph Company's right to bring a suit on the law side of the court to obtain a judgment against the Baltimore and Ohio Telegraph Company, an insolvent corporation.

> After this conveyance and transfer the Baltimore & Ohio Telegraph Company of Baltimore County could not any longer

> perform its covenants with the Interstate Telegraph Company, having been denuded of its property and plant thereby. Thereupon the latter company brought its suit on the law side of the Circuit Court for the District of Maryland and recovered judgment against the Baltimore & Ohio Telegraph Company in the sum of $25,000. Execution was issued on this judgment, and returned nulla bona. Upon this the Interstate Telegraph Company instituted proceedings on the equity side of the same court against the Baltimore & Ohio Railroad Company and the Baltimore & Ohio Telegraph Company of Baltimore County, seeking the payment of this judgment. (Id., 53.)

In the above case the Baltimore and Ohio Railroad practically owned the Baltimore and Ohio Telegraph Company and sold all the assets of the latter corporation to the Western Union Telegraph Company. The proceeds of this sale were held to be a trust fund out of which a court of equity would enforce the payment of the judgment for $25,000. The case of *Swan Land and Cattle Company* v. *Frank*, 148 U. S. 603, cited in the opinion of the court below as conclusive, is directly in point. In this case a suit in equity was brought against several stockholders of three corporations which, though in existence, had distributed their corporate funds among their stockholders. The suit sought to collect unliquidated

damages. The bill was ordered dismissed because plaintiff's claim had not been reduced to judgment and the debtor corporations had not been made parties. In other words, it appears that even if the several corporations had no assets, a judgment should have been obtained against them and execution issued before a creditor's bill would lie. Neither of the reasons which stood in the way of relief in this case is present in the case at bar. Here the plaintiff has a judgment on which execution has been returned unsatisfied, and the Waters Pierce Oil Company, the judgment debtor, is a party defendant.

> A party having a claim for unliquidated damages against a corporation which has not been dissolved, but has merely distributed its corporate funds amongst its stockholders and ceased or suspended business, can not maintain a suit on the equity side of the United States Circuit Court against a portion of such stockholders, to reach and subject the assets so received by them to the payment and satisfaction of his claim, without first reducing such claim to judgment, and without making the corporation a defendant and bringing it before the court.
>
> Corporations are indispensable parties to a bill which affects corporate rights and liabilities. *Swan Land & Cattle Company* v. *Frank*, 148 U. S. 603. (From the syllabus.)

Discussing the trust fund theory on page 609, the court said:

> The theory of the bill is that the assets of the vendor corporations which have been distributed to and received by the defendants as stockholders constitute a trust fund for the payment of all debts and demands against the companies and may therefore be followed in the hands of, and recovered from, such stockholders to the extent necessary to discharge valid claims against the corporations from which they were received. The funds sought to be reached are undoubtedly applicable, under proper proceedings against all necessary parties, to the payment, so far as may be needed, of outstanding indebtedness against the corporations which distributed the same; but the difficulty here is that the complainant has not adopted the requisite and necessary procedure to subject said funds thereto. It has no judgment against the corporations by which it was defrauded, nor are such corporations made parties defendant to the suit or brought before the court. The stockholder defendants who have been served with process and entered their appearance do not undertake to represent, and can not in any way represent, the corporations against whom the claim for damages is asserted. *Bronson* v. *La Crosse & Milwaukee Railroad*, 2 Wall. 283, 301, 302.

Even where the trust fund theory is not involved this court has recognized the rights of creditors

whose claims may supervene in the future. In the case of *Smith et al.* v. *Vodges*, 92 U. S. 183, an individual made a settlement of some property upon his wife. The court held:

> The law of this case is too well settled to admit of doubt. In order to defeat a settlement made by a husband upon his wife it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene, or creditors whose rights may and do so supervene; the settler purposing to throw the hazards of business in which he is about to engage upon others, instead of honestly holding his means subject to the chance of those adverse results to which all business enterprises are liable. *Sexton* v. *Wheaton*, 8 Wheat. 229; *Mullen* v. *Wilson*, 8 Wright, 413; *Stileman* v. *Ashdown*, 2 Atk. 481.

## V.

**There is a proper joinder of parties and causes of action in the bill of complaint.**

Rule 26 of the new equity rules is applicable to this case for that rule was promulgated prior to the commencement of this suit. *Miller Rubber Company* v. *Behrend et al.*, 242 Fed. 515, 517. This rule broadens the power of a plaintiff to join in one bill many causes of action. The rule provides:

> The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when

> there are more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action can not be conveniently disposed of together, the court may order separate trials.

Under the above rule the plaintiff may join as many causes of action cognizable in equity as he may have against the defendant. Where there are more than one defendant the liability must be asserted against all of the material defendants or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. Under this rule it can not possibly be said that the bill of complaint in this case is multifarious. In this case the liabilitiy is asserted against every one of the defendants. There is really only one cause of action set forth in the bill. Plaintiff asked for an accounting from all of the defendants of the stock and money received by them in liquidation of the Waters Pierce Oil Company and for a decree against them for the amount of its judgment. This rule has been construed several times by a Federal court and the courts appear to have recognized that the rights of plaintiffs to join different

causes of action and to assert them against several defendants have been greatly broadened. In the case of *Miller Rubber Company* v. *Behrend*, 242 Fed. 515, 517, the court after citing rule 26, held that, "Under this rule, provided the diversity of citizenship exists, and it does exist in this case, we see no reason why the plaintiff was not entitled to join in one bill its cause of action on the patent and its cause of action for unfair competition." And again in *Elder* v. *Western Mining Company*, 257 Fed. 970, 977, it was said:

> No complaint is multifarious which presents a common point of litigation, the decision of which will affect the whole subject matter and will settle the rights of all the parties to the suit, and it is not indispensable that all the parties should have an interest in all the matters contained in the suit, but it is sufficient that each party has an interest in some material matters involved therein and they are connected with the others.

It was also held that under this rule a bill for the foreclosure of two mortgages was not multifarious. *Crawford* v. *Washington Northern Railroad Company*, 233 Fed. 962.

Even applying the practice followed prior to the promulgation of rule 26, this bill of complaint could not be called multifarious. It contains all requisites essential to a joinder of parties and causes of action as set forth in several Federal

decisions. In *Bitterman* v. *Louisville & Nashville R. R.*, 207 U. S. 205, 226, it was said:

> The proposition that the bill was multifarious because of the misjoinder of parties and causes of action was not assigned as error in the Circuit Court of Appeals, and, therefore, might well be held not to be open. But passing that view, we hold the objection to be untenable. The acts complained of as to each defendant were of a like character, their operation and effect upon the rights of the complainant were identical, the relief sought against each defendant was the same, and the defenses which might be interposed were common to each defendant and involved like legal questions. Under these conditions the case is brought within the principle laid down in *Hale* v. *Allinson*, 188 U. S. 56, 77.

The following authorities also hold the like view:

*Brown* v. *Guarantee Trust & Safe Deposit Co.*, 128 U. S. 403;

*Rogers* v. *Penobscot Mining Co.*, 154 Fed. 606;

*Fowler* v. *Palmer, et al.*, 160 Fed. 1;

*M'Mullen Lumber Co.* v. *Strother*, 136 Fed. 295;

*South Penn Oil Co.* v. *Calf Creek Co.*, (C. C.) 140 Fed. 507–516;

*Weir* v. *Bay State Gas Co.*, 91 Fed 940;

*Simpkins Federal Equity Suit*, page 290; and

*Jones Manual Equity Pleading & Practice*, page 49.

It is entirely unnecessary to join all the stockholders as party defendants. *Hatch* v. *Dana*, 101 U. S. 205.

## VI.

**The Government's suit against the Pierce Oil Company in the Western District of Louisiana was no election of remedies barring the United States from bringing the present suit.**

It is contended that the Government, by filing suit against the Pierce Oil Company, made an election of remedies and was thereby estopped from bringing the present suit. The suit was brought to collect the judgment out of the property sold by the Waters Pierce Oil Company to the Pierce Oil Company. The cause of action was based on the trust fund theory. Thus it will be seen that the two suits are similar. Both were actions brought in equity to collect a judgment out of the assets of the insolvent corporation. They were suits of the same nature brought for similar purposes. There is no inconsistency. It is sought in each case to collect a judgment against the insolvent corporation. It would be indeed strange if a creditor could not pursue the property of his debtor at the same time in the hands of different parties. The test of the applicability of the doctrine of election of remedies is whether or not the suits are inconsistent.

> Where the remedies afforded are inconsistent it is the election of one of such remedies which operates as a bar; but where the

remedies afforded are consistent it is the satisfaction of the claim which operates as a bar. (20 Corpus Juris, 8.)

The fact that a trustee in bankruptcy obtained a money judgment against one to whom the bankrupt transferred certain assets to delay and defraud creditors, held, in this case, not to have amounted to ratification of the bankrupt's act or to an election not to pursue the assets transferred, but the bankrupt was entitled to also maintain a bill in equity to set aside the transfer. (*Thomas* v. *Sugarman,* 218 U. S. 129; from the syllabus.

The doctrine of election is applicable as between inconsistent remedies; but does not apply to a partner wrongfully excluded from participation. He does not lose his right to an accounting because he first starts an action at law which he subsequently dismisses. (*Zimmerman* v. *Harding,* 227 U. S. 489; from the syllabus.)

And again, on page 493, it is said:

> But we think the doctrine of the election of remedies has no proper application here. The essential element of that rule is that there must have been a right of choice between two remedies which are inconsistent with each other. *Bierce* v. *Hutchins,* 205 U. S. 340.

In *Westervelt* v. *Mohrenstecher,* 76 Fed. 118, 124, it was held that, in an action on a cashier's bond for damages arising from breach thereof by his misappropriation of money and making of exces-

sive loans, the fact that the bank and its receiver have sued and obtained judgment upon notes taken by the cashier for such misappropriated money and excessive loans is no defense.

> The fact that the bank or its receiver has sued and obtained judgments upon the promissory notes which this cashier took for misappropriated money of the bank and for excess loans is no defense to this action. This is not an action to rescind any contract and recover back the consideration thereof. It is an action for damages for breach of the conditions of this bond. The obligation of the bond is to pay any loss or damage which the bank sustained by the failure of this cashier to faithfully fulfill and perform the trust reposed in him and to comply with the other conditions expressed therein. Neither the bank nor the receiver is required to repudiate his transactions or restore the consideration it has received from them, in order to maintain this action. There is no inconsistency between an action upon the notes he wrongfully took and a recovery of all that the makers can pay upon judgments thereon, and an action upon this bond for the losses sustained by the breach of its conditions. The bank and the receiver may take every benefit they can derive from the acts of this cashier, use every just endeavor to collect every note he has obtained in the name of the bank, and at the same time may press this action on the bond for the damages

> caused by the breach of its conditions. Of course, the bank and the receiver can have but one payment and satisfaction of the debts owing upon the notes the cashier took, and when they are paid in full that payment will constitute a defense to this action, but until then both remedies may be pursued. *Vulcanite Co.* v. *Caduc,* 144 Mass. 85, 10 N. E. 483; *Bank* v. *Birch,* 130 N. Y. 221, 29 N. E. 127; *Emery* v. *Baltz,* 94 N. Y. 408; *White* v. *Smith,* 33 Pa. St. 186.

Furthermore, it has been held that even if two remedies are inconsistent, a party may pursue both until he recovers through one.

> It is specified as error that the court refused to hold that the receiver was barred from maintaining this action on the bond because he had brought an action against the Masonic Home on the note for $3,000 made by Tygard in its name, and for money had and received by the home, and because it had good causes of action against the home therefor. But there was no error in this ruling, although the action on the note, which necessarily asserted the authority of Tygard to make it, was inconsistent with the theory of the action on the bond, which is that he had no such authority. Where a wrong has been perpetrated and the victim is doubtful which of two inconsistent remedies is the right one, he may pursue both until he recovers through one, and in the absence of facts creating an equitable estoppel, his prosecution of the wrong rem-

> edy to a judgment of defeat will not estop him from subsequently pursuing the right one to victory. * * * The contract of the defendants was to indemnify the bank against any loss it might sustain from the failure of their principal to discharge faithfully the duties of his office, and until those losses are repaid it is no defense for them that the bank, or its receiver, has or pursues other remedies to relieve from them. *Rankin* v. *Tygard et al.*, 198 Fed. 795, 806.

In the Louisiana case no action had been taken except that the bill and answer were filed (Rec., pp. 37, 46). The position of the appellants has not in any way been altered or prejudiced by such preliminary steps. This fact has heretofore been considered important.

> The law is not such an exact science that rights and remedies are clear at all times, and it does not tend to justice to hold one strictly to a bare election between them where nothing has been gained and no one prejudiced. We think the claimant is entitled to the proceeds of the articles embraced in its contracts not exceeding, however, the amount the bankrupt was to pay, with interest. *Nauman Co.* v. *Bradshaw*, 193 Fed. 350, 354.

In *Slaughter et al.* v. *La Compagnie Francaises Des Cables Telegraphiques*, it was said that—

> The beginning, therefore, of an action at law for damages, or of a suit in equity for specific performance, does not operate as a

decisive act, which determines the rights of the parties once for all. But if the plaintiff institute separate actions, he can not carry both to judgment and satisfaction, and may be compelled by order of the court, at any stage of the proceedings, to elect which he will further prosecute. *Rogers* v. *Vosburgh,* 4 Johns. Ch. 84; *Livingston* v. *Kane,* 3 Johns. Ch. 224. In *Fox* v. *Scard,* 33 Beav. 327, defendant had contracted not to carry on the business of surgeon at a particular place for a certain period of time, and had executed a bond in the penal sum of £1,000, conditioned to the same effect. It was held that a recovery of damages at law would bar his prosecution of a suit in equity for an injunction. To the same effect is *Sainter* v. *Ferguson,* 1 Macn. & G. 286. Defendant here relies on a dictum in *Fox* v. *Scard* referring to former practice in equity, where the legal right was in doubt, under which the court used to direct an action to try the right. If plaintiff merely established his right, and took nominal damages, he obtained equitable relief; but, if he sought and obtained substantial damages, the court, when he came back, dismissed his bill, saying, "You have already had your remedy at law." But the case at bar is not parallel. Plaintiff has not been directed or allowed by a court of equity to try the single issue of legal right in a court of law. In his action at law he sought for damages—actual not nominal damages. Modern practice does not allow a party to bring an action

> at law, not for damages, but to establish some single issues in the controversy, such as validity of contract, breach of it, or what not, and then, having determined those issues in one action, to bring a second action for the relief appropriate to the facts found in the first one. If he sues at law for a breach, he is entitled to recover the damages he has sustained by such breach; and recovering them, whether their amount be large or small, bars him from insisting thereafter in equity that defendant perform the contract. If, as the trial of the action at law progresses, plaintiff discovers that the evidence is not likely to secure him sufficient damages, he should apply to withdraw a juror, so as to leave himself free to apply thereafter for equitable relief. In the cause at bar he was warned by the ruling of the trial judge, before it was sent to the jury, that he could not expect substantial damages. When after that he persisted in going on to verdict and judgment, he made an election which he can not now repudiate. *Slaughter et al.* v. *La Compagnie Francaises Des Cables Telegraphiques,* 119 Fed. 588, 589.

And again in *Brady* v. *Daly,* 175 U. S. 148, 160, it was held that—

> The plaintiff in error further claimed that the plaintiff below, by first proceeding in equity for an injunction, and incidentally for an accounting of profits, made an election to recover profits, which effectually

barred him from a recovery of damages under the statute.

The equity action was brought to enjoin the defendant from performing the play of "After Dark" with the railroad scene in it, taken from the plaintiff's play "Under the Gas Light," and the injunction was asked for on the ground that plaintiff's injuries could not be accurately ascertained or computed, and compensation for such injury could not be made by damages, and as a portion of the relief complainant asked that the defendant be decreed to render a full and true account of all money and profits received by him. The decree in that case, however, did not direct the master to ascertain anything in regard to profits, no evidence was offered upon that subject, no finding was made thereon, and upon the coming in of the master's report no final judgment or decree for profits was ever asked or rendered.

In view of these facts, we think there was no election of an inconsistent remedy by the plaintiff in the action which would bar him from the maintenance of this action for the recovery of damages under the section of the Revised Statutes before referred to. *Brady* v. *Daly*, 175 U. S. 148, 160.

## VII.

**There was no necessity of bringing suit in Missouri.**

Appellants contend that this suit in equity will not lie in Missouri for the reason that a judgment at law had not been rendered in that State. It

is true that no judgment had been obtained, but that is entirely unnecessary. The Government exhausted all of its legal remedies against the Waters Pierce Oil Company. Execution was issued on the judgment in Louisiana and returned nulla bona, and execution was likewise sued out of the United States District Court for the Western District of Louisiana, directed to the marshal of the Eastern District of Missouri, and a nulla bona return was also made on that execution. This procedure is authorized by section 986 of the Revised Statutes. That section provides:

> All writs of execution upon judgments obtained for the use of the United States, in any court thereof, in one State may run and be executed in any other State or in any Territory, but shall be issued from, and made returnable to, the court wherein the judgment was obtained.

Thus it will be seen that judgments obtained for the use of the United States may run and be executed in any court of Federal jurisdiction in any part of the Union. It is, of course, true that an execution on a judgment where mere individuals are involved can be executed only in the State where the judgment was obtained, but it appears that the above section makes judgments obtained for the use of the United States an exception to this general rule. In *Toland* v. *Sprague,* 12 Peters 300, 328, the court has distinguished be-

tween executions on judgments for the use of the United States and those for the use of individuals.

> In regard to final process, there are two cases, and two only, in which writs of execution can now by law be served in any other district than that in which the judgment was rendered; one in favor of private persons, in another district of the same State; and the other, in favor of the United States, in any part of the United States.

It is also contended by the appellant that section 986 does not apply to executions upon judgments in penal cases imposing a fine. This contention can not prevail. It has already been shown that "In all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced." So it will be seen that judgments in favor of the United States are treated alike whether criminal or civil and execution will issue *for the use of the United States.* Section 986, Revised Statutes, applies to all executions upon judgments *obtained for the use of the United States.* It must include judgments in criminal cases. The word judgments in section 986, read in connection with section 1041, is used in a broad

sense—including judgments or sentences in criminal cases. In *State* v. *Lynch*, 28 Rhode Island, 463, 404, the question was raised as to whether the word judgment in a statute was broad enough to include a sentence in a criminal prosecution. The court held:

> It is urged on behalf of the State that section 473 is not applicable to criminal cases. This contention is principally founded on the fact that the section does not use the word "sentence," or any equivalent expression which would specially designate the judgment in a criminal case, as is done in sections 487, 490, and 491, where both words "judgment" and "sentence" are used. We do not regard the omission of the word "sentence," in the section under consideration, as conclusive, since, in the corresponding provision, chapter 251, section 3, Gen. Laws, 1896, for which section 473, Court and Practice Act was substituted, makes the same omission. That section in terms affords its remedy in the case of "indictments or other criminal prosecutions in which verdict or judgment shall have been rendered against the petitioner." The word "judgment" was clearly used here in its broad sense, which includes a sentence as well as the final decision of the court in a civil case. It seems probable that the commissioners drafting the present law adopted the language of the section they were revising, and considered the word "judgment" as ample to comprehend both

> classes of proceedings. The present law is as necessary in criminal proceedings as in civil cases. We see no reason why a person who has been convicted of crime should not have, within a reasonable time after sentence, an opportunity to correct the effects of any mistake or accident which may have prevented him from prosecuting a bill of exceptions in due time, or to avail himself of newly discovered evidence after the time has elapsed within which he could have presented it as a ground for new trial to the superior court, while such a privilege is given to the unsuccessful party to a civil suit.

The contention is also made that this suit is premature, because even if section 986, Revised Statutes, applies, the bill of complaint does not aver that an execution was issued to the marshal of the Eastern District of Missouri. The amended bill states that an execution upon a judgment was issued out of the United States District Court for the Western District of Louisiana directed to the United States Marshal for the Eastern District of Missouri and that a nulla bona return on said execution was made. This procedure is authorized by rule 34 of the new equity rules.

> Upon application of either party the court or judge may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was igno-

rant when it was made, including the judgment or decree of a competent court rendered after the commencement of the suit, determining the matters in controversy or a part thereof.

## VIII.

**The question as to whether interest upon the judgment was properly awarded, not having been raised in the court below, will not be passed on here.**

The district judge entered a decree in favor of the United States with interest. Upon appeal to the Circuit Court of Appeals the appellants did not include the question of interest in their assignments of error. It is not shown anywhere in the record nor in the briefs that the question was raised in either the trial or appellate courts, except in a petition to rehear filed in the latter court. Upon affirmance of the decree of the District Court the appellants were denied a rehearing. Then this appeal was perfected and the question of interest was assigned as error, though it had not been one of the errors assigned in the Court of Appeals.

It has been consistently held by this court that no issue not raised in the lower court will be passed on here, and that the assignments of error can not enlarge or add to the issues passed on by the lower court. *Waters Pierce Oil Co.* v. *Texas*, 212 U. S. 112; *Mallers* v. *Commercial Loan & Trust Co.*, 216 U. S. 613; *Cleveland, etc., Ry. Co.*

v. *Cleveland,* 235 U. S. 50; *Keokuk and Hamilton Bridge Co.* v. *Illinois,* 175 U. S. 626.

The above authorities involve cases appealed from State courts. In the case of *Virtue* v. *Creamery Package Co.,* 227 U. S. 8, 38, in a case brought upon error from the Circuit Court of Appeals, it was held that—

> But plaintiffs urge that the Creamery Package Manufacturing Company was of itself a combination offensive to the statute and that they were entitled to go to the jury as to that company. But the contention was not made in the Circuit Court nor was it made in the Circuit Court of Appeals. * * * It is manifest, therefore, that the separate liability of the Creamery Package Manufacturing Company is an afterthought and urged in this court for the first time (pp. 38–39).

In the case of *Lloyd* v. *Preston,* 146 U. S. 630, 645, the question of interest was raised for the first time in the Supreme Court and it was held that—

> Error is likewise assigned to the allowance of interest on the judgments after the date of Harper's assignment. It is claimed that, as against the estate in the hands of the assignee, interest ceased from the date of the assignment.
>
> There is nothing before us to show that there are not funds in the hands of the assignee sufficient to pay Harper's debts in full, with interest to the date of payment,

> and as it does not appear that this matter was brought to the attention of the court below, when framing the decree, or at any time, we do not feel disposed to disturb the decree.

The petition for a rehearing included in its contentions the matter of interest. The Circuit Court of Appeals denied the petition, with the brief statement that—

> It is urged that the trial court erred in the matter of interest included in the judgment under review. As this question was not raised by the assignments of error and briefs at the hearing we do not think it should be considered now. The other matters in the petition for rehearing were fully considered and we see no reason for changing the conclusion.
>
> The petition is denied. (R. 72.)

The fact that the question was included in the petition for a rehearing can not be said to have raised the bar caused by failure to assign it as error and thereby give appellants the privilege of including it here in the assignments of error. The granting or denying of a petition to rehear is discretionary with the court, upon which an appeal will not lie. *Brown* v. *Clarke,* 4 How. 3, 15; *Roemer* v. *Bernheim,* 132 U. S. 103, 106.

In the latter case it was said:

> The granting or refusal, absolute or conditional, of a rehearing in equity, as of a new trial at law, rests in the discretion of

> the court in which the case has been heard or tried, and is not a subject of appeal (p. 106).

The Supreme Court will not consider questions raised for the first time in a petition to the court below for a rehearing. Such questions are not a part of the record.

> But as a petition for rehearing forms no part of the record, it can not be noticed. The jurisdiction of the court depends on the matters disclosed in the bill of exceptions. *Lagrange* v. *Chouteau,* 4 Pet. 287, 288.

In *Giles* v. *Heysinger,* 150 U. S. 627, 630, the same view is upheld—

> Acting upon this theory, the court directed an interlocutory decree for the plaintiffs. Defendants thereupon moved immediately for an order to reopen the case for the admission of additional testimony bearing upon the question of anticipation, and for a rehearing; and presented seven affidavitis in support of Blakesley's testimony concerning the manufacture of crimpers by passing a bare strip of metal through the dextrine before the silk braid was applied; and also the affidavit of his counsel, explaining the omission of the mention of this particular in the affidavits of Wright and Blakesley, read in opposition to the motion for a preliminary injunction. The court denied a rehearing, and the case was referred to a master, who proceeded to

take testimony in respect to the damages, and submitted a report, upon which a final decree was entered. Under these circumstances, we have not felt at liberty to consider the affidavits for a rehearing.

CONCLUSION.

It is respectfully submitted that the decree of the Circuit Court of Appeals be affirmed.

ROBERT P. FRIERSON,
*Attorney.*
WILLIAM L. FRIERSON,
*Solicitor General.*

JANUARY, 1921.

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# SUPREME COURT OF THE UNITED STATES.

No. 173.—October Term, 1920.

| | |
|---|---|
| Clay Arthur Pierce, Henry Clay Pierce and Pierce Investment Company, Appellants, *vs.* The United States of America. | Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. |

[March 7, 1921.]

Mr. Justice Brandeis delivered the opinion of the Court.

In 1907 the Waters Pierce Oil Company, a Missouri corporation, was indicted in the District Court of the United States for the Western District of Louisiana under the Elkins Act (February 19, 1903, c. 708, Section 2, 32 Stat. 847), for receiving rebates. In 1913 the Company sold and transferred all its property to the Pierce Oil Corporation; all the proceeds were paid to Henry S. Priest and Clay Arthur Pierce as trustees; and they distributed the same among the stockholders. Of these Henry Clay Pierce and the Pierce Investment Company, received millions in cash and stock and Clay Arthur Pierce a small amount. In 1914 the case under the Elkins Act was tried. The Company was convicted and sentenced to pay a fine of $14,000, and in the following year the judgment was affirmed by the Circuit Court of Appeals. 222 Fed. 69. An execution issued thereon to the marshal for that district and was returned *nulla bona*. Thereafter this bill in equity was brought by the United States in the Federal District Court for the Eastern District of Missouri against the Waters Pierce Oil Company, the trustees, and these three stockholders to obtain satisfaction of the judgment out of the money remaining in the hands of the trustees and that received by these stockholders. The District Court entered a decree dismissing the bill as against the Waters Pierce Company and the trustees, but granted, as against the stockholders named, the relief prayed by the Government. The decree

was affirmed by the Circuit Court of Appeals for the Eighth Circuit, one judge dissenting. The case is brought here by these defendants, under Section 241 of the Judicial Code. Reversal is sought on several grounds.

*First.* The ground for reversal most strongly urged is that the judgment imposing a fine on the Waters Pierce Company is not a debt on which a creditor's bill will lie. The argument is that a judgment for a definite sum of money does not necessarily endow the holder with all the rights of a creditor; that a court will look behind a judgment and will grant or deny relief according to the nature of the original cause of action, as it did in *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265; *Louisiana* v. *New Orleans*, 109 U. S. 285; and *Westmore* v. *Markoe*, 196 U. S. 68; and that, since liability for a penalty is criminal in its nature and not strictly a debt, a creditor's bill cannot be brought upon a judgment for a penalty. It is true that to the liability for penalties imposed by the United States certain incidents of a criminal proceeding attach; see *Boyd* v. *United States*, 116 U. S. 616; *United States* v. *Stevenson*, 215 U. S. 190, 199. But the liability is often enforced by civil proceedings and specifically by the action of debt. *Lees* v. *United States*, 150 U. S. 476. See *Adams* v. *Woods*, 2 Cranch. 336, 340; and then certain incidents of civil proceedings attach. *Hepner* v. *United States*, 213 U. S. 103.

By Section 1041 of the Revised Statutes it is provided (in addition to the power existing by general usage to commit a defendant to jail until his fine has been paid, see *Ex parte Barclay*, 153 Fed. 669) that judgments for penalties "may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced." The statute applies to all judgments for penalties, whether recovered by civil or criminal proceedings. A judgment creditor's bill is in essence an equitable execution comparable to proceedings supplementary to execution. See *Ex parte Boyd*, 105 U. S. 647. The law which sends a corporation into the world with the capacity to act imposes upon its assets liability for its acts. The corporation cannot disable itself from responding by distributing its property among its stockholders and leaving remediless those having valid claims. In such a case the claims after being reduced to judgments may be satisfied out of the assets in the hands of the stockholders.[1] There is no good

reason why the rule should be limited to judgments arising out of civil proceedings. To the contention that the statute has not made this process available for the Government in enforcing a penalty, it may be answered as was done by the King's Bench a hundred years ago, in *King* v. *Woolf*, 2 B. & Ald. 609, 611, when it was insisted that a fine due to the Crown was not a judgment debt for which execution could be levied:

"... mischievous consequences would ensue to the crown and the regular administration of justice, from a delinquent withdrawing all his property from the effect of a judgment; and the preventing that will not be a mischievous consequence to anyone but himself. Here there is a judgment that the defendant do pay to the king a fine of a certain sum. By that judgment the debt becomes a debt to the king, of record; and it is payable to the king instanter. ... if we were to say that the Crown shall not be at liberty to issue an immediate execution for its own debt, we should place the crown in a worse situation than any subject."

*Second.* It is contended that the right to bring a creditor's bill did not exist, because the judgment against the Company was not entered in the trial court until a year after the Company had divested itself of the property sought to be reached in this suit; and the Government did not become a creditor, at all events until after its claim for penalties had ripened into a judgment. But when a corporation divests itself of all its assets by distributing them among the stockholders, those having unsatisfied claims against it may follow the assets, although the claims were contested and unliquidated at the time when the assets were distributed. It is true that the bill to reach and apply the assets distributed among the stockholders cannot, as a matter of equity jurisdiction and procedure, be filed until the claim has been reduced to judgment and the execution thereon has been returned unsatisfied, *Hollins* v. *Brierfield Coal and Iron Company*, 150 U. S. 371; but, as a matter of substantive law, the right to follow the distributed assets (see *Railway* v. *Howard*, 7 Wall 392, 409; *Northern Pacific Ry.* v. *Boyd*, 228 U. S. 482; *Kansas City Ry.* v. *Guardian Trust Co.*, 240 U. S. 166) applies not only to those who are creditors in the commercial sense, but to all who hold unsatisfied claims. A corpora-

[1]Wood v. Dummer, 3 Mason 308; Railroad Co. v. Howard, 7 Wall. 392; Northern Pac. Ry. Co. v. Boyd, 228 U. S. 482, 502; Kansas City Trust Co v. Guardian Trust Co., 240 U. S. 216; Johnson v. Canfield-Swigart Co., 292 Ill. 101; Hastings v. Drew, 76 N. Y. 9.

tion cannot by divesting itself of all property leave remediless the holder of a contingent claim, or the obligee of an executory contract, *Baltimore & Ohio Tel. Co.* v. *Interstate Tel. Co.*, 54 Fed. 50, or the holder of a claim in tort, *Hastings* v. *Drew*, 76 N. Y. 9; *Jahn* v. *Champagne Lumber Co.*, 157 Fed. 407; and there is no good reason why the United States with a claim for penalties should be in a worse plight. Here the stockholders receiving the assets are in the position of volunteers; and there is not even the excuse that they were ignorant of the Government's claim. They were officers of the corporation, and the indictment was pending when the transfer of the assets was made. *See Baltimore & Ohio Tel. Co.* v. *Interstate Tel. Co., supra.*

*Third.* It is contended that the bill should have been dismissed because the execution issued to the marshal for the Eastern District of Missouri was not returned unsatisfied until after the commencement of the suit. It has been held that in litigations between private parties a creditor's bill cannot be maintained in a Federal court upon a judgment recovered in a State other than that in which suit is brought, *National Tube Works* v. *Ballou*, 146 U. S. 517, 523; and that a return unsatisfied of the execution issued on the judgment sued on is held essential to the maintenance of the creditor's suit, *Taylor* v. *Bowker*, 111 U. S. 110. But this strict rule is not applicable where the United States is the judgment creditor. Under Section 986 of the Revised Statutes an execution issued in favor of the United States by any of its courts runs in every part of the United States; just as under Section 985 an execution on a judgment obtained in favor of any party in a District Court, where the State is divided into two or more districts, may run and be executed in any part of the State. *Toland* v. *Sprague*, 12 Pet. 300, 328. Here the execution issued to the Louisiana marshal had been returned *nulla bona* before this suit was brought; and it is agreed that when this suit was begun the Waters Pierce Oil Company had no property in Missouri or elsewhere out of which the judgment could be satisfied at law. To hold that under such circumstances the suit must fail, because the return of *nulla bona* was not made by the marshal for the Eastern District of Missouri until after the filing of the original bill, would apply a well settled rule to a case not within its scope.

*Fourth.* It is contended that the bill should have been dismissed because the Government had an adequate remedy by suing

the Pierce Oil Corporation, and, indeed, had commenced such a suit. That corporation assumed, as part of the purchase price of the Waters Pierce Oil Company, its "debts, obligations and liabilities." Before commencing this suit the Government had brought, in a Federal District Court for Louisiana, a suit against the Pierce Oil Corporation to subject to the satisfaction of its judgment certain parcels of land conveyed to the corporation by the Waters Pierce Oil Company. But in the Louisiana suit the Pierce Oil Corporation denied liability insisting that the Government was not a creditor of the Waters Pierce Oil Company. The United States could not have been required to accept in lieu of its claim against the judgment debtor even an admitted obligation of the new corporation to pay it. The existence of that possible remedy did not bar the Government from following by a creditor's bill the assets of the corporation into the stockholder's hands. Nor did the suit against the Pierce Oil Corporation amount to an election of remedies which should have led the lower courts to dismiss this bill. The two remedies were consistent. See *Zimmerman* v. *Harding*, 227 U. S. 489, 494.

*Fifth.* The contention is faintly made that the decree should be reversed because the District Court dismissed the bill as against the Waters Pierce Oil Company, a necessary party; citing *Swan Land and Cattle Co.* v. *Frank*, 148 U. S 603, 610. The argument ignores the fact that this judgment being in favor of the United States is, under Section 986 of the Revised Statutes, effective and may be made the basis of an execution running in a State and district other than that in which the judgment was rendered. It was doubtless for this reason that the District Judge concluded that it was unnecessary, if not improper, to enter in this suit judgment against Waters Pierce Oil Company. The objection is purely technical. Since it was not set up among the many errors assigned in the Court of Appeals and in this court, it cannot be availed of here.

*Sixth.* It is urged that the District Court erred in allowing interest on the penalty ($14,000) from the date of the indictment, January 29, 1907. This was not assigned as error in the Circuit Court of Appeals, and for this reason that court refused to consider it on a petition for rehearing. In the assignment of errors filed in this court the objection was properly raised. Under

Rule 24 of the Circuit Court of Appeals for the Eighth Circuit the court may "notice a plain error not assigned or specified, and we think it should have done so in this case. In allowing interest from January 29, 1907, the District Court was clearly under the misapprehension that that was the date of the judgment, for the decree so recites; whereas, in fact, judgment was not entered until March, 1914. But interest was not even allowable from that time. At common law judgments do not bear interest; interest rests solely upon statutory provision. *Perkins* v. *Fourniquet*, 14 How. 328; *Washington & Georgetown R. R.* v. *Hermon*, 147 U. S. 571, 584-5. The only applicable statute of the United States is Section 966 of the Revised Statutes which provides that "Interest shall be allowed on all judgments in civil causes, . . ." Since the penalty was not recovered by civil process but by judgment in a proceeding initiated by a criminal indictment, it obviously does not fall within the terms of the statute. Interest, therefore, is allowable only on the judgment from the date when it was entered against the defendants in this case, namely March 11, 1918.

The judgment of the Circuit Court of Appeals as modified is

*Affirmed.*

A true copy.

Test:

*Clerk Supreme Court, U. S.*